AMERICAN UNIVERSITY
WASHINGTON COLLEGE OF LAW
Roger A. Fairfax, Dean

June 1, 2023

Re: Clerkship Application of Shahnoor Khan

Dear Judge Matsumoto:

I am the Dean of the American University Washington College of Law, and I write to recommend 3L Shahnoor Khan for a clerkship in your chambers. Shahnoor is my research assistant, and she is currently the Editor-in-Chief of the *American University Law Review*.

Shahnoor has completed several research assignments on various topics related to criminal procedure and criminal justice policy. Shahnoor's work product is consistently helpful and accurate. Her writing is lucid and concise, and her research is thorough.

Shahnoor also exhibits creativity of analysis; without prompting, she often contributes valuable insight on the broader research project while completing her more narrow assigned research tasks. Furthermore, Shahnoor displays strong organization and focus. In addition, Shahnoor is a pleasure to work with, and brought her quiet energy and work ethic to every research task.

Shahnoor has had an extraordinary law school career here at the American University Washington College of Law. She serves as Editor-in-Chief of the *American University Law Review*, a tremendous honor entailing broad responsibility for project management and the oversight of the editing of legal scholarship. It goes without saying that being elected to the top position of the flagship law review on campus reflects the esteem in which she is held by her peers, and her demonstrated commitment to excellence.

At the same time, Shahnoor has been an outstanding student during her time here at AUWCL. She reports a cumulative grade point average of 3.79, and a rank in the top 10% of the

WASHINGTON COLLEGE OF LAW
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class. She received the highest grade designation in her Criminal Law class. Her strong academic performance led to her being selected as a Teaching Assistant for the Criminal Law course.

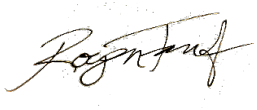
Shahnoor also has distinguished herself in her other extracurricular pursuits, including service as a Dean's Writing Fellow for AUWCL's Legal Research and Writing Program, a Research Assistant to Professor Bec Hamilton, Co-Director of the Wechsler National First Amendment Competition through the Moot Court Honor Society. She also has been active in both the Women's Law Association and the Muslim Law Students Association.

In addition, Shahnoor has had a number of impressive and valuable work experiences, including with the U.S. Department of Justice Office of Legal Policy, and the U.S. Department of Homeland Security. She was a summer associate with Ropes & Gray LLP during her second summer of law school and received an offer to return as an associate at that prestigious firm after graduation. Shahnoor's substantial and relevant work experience will no doubt enhance her ability to make a valuable contribution in your chambers.

Shahnoor's academic and extracurricular record, demonstrated research and writing skills, and valuable experience all position her well to hit the ground running and to serve as a trusted and valued law clerk in your chambers. I recommend Shahnoor highly, and I hope that her application receives the most serious consideration.

Thank you for your consideration of this letter. Please do not hesitate to contact me at rogerfairfax@wcl.american.edu, if there is any further information I can provide.

Sincerely,



Roger A. Fairfax, Jr.
Dean and Professor of Law

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202-274-4007

U.S. Department of Homeland Security
Transportation Security Administration
6595 Springfield Center Drive
Springfield, Virginia 20598

May 3, 2023

To Whom It May Concern:

It is my pleasure to provide a letter of recommendation for Shahnoor Khan for inclusion in her Federal Clerkship application with your office.

During the late spring and summer of 2021, Shahnoor participated in the Department of Homeland Security, Transportation Security Administration, Chief Counsel summer intern program. While serving as an intern, she worked directly for me, conducting research and drafting opinions on a wide variety of issues. Shahnoor proved herself to be extremely hard-working and diligent. She conducted herself with an extraordinary level of professionalism, maturity and judgment.

Shahnoor exhibited a remarkable ability to grasp complex and often novel legal matters. This was evidenced by her ability to issue-spot and conduct thorough legal research subsequently used both by me and my clients. Her legal opinions were concise, well written, and organized in a manner easily utilized by the intended audience. I received positive feedback from my clients about her advice and input on a variety of legal matters related to the TSA mission.

For example, Shahnoor conducted research and provided insightful analysis on novel legal issues related to the use of canines by the government in both an administrative and criminal context. Her legal brief helped inform my recommendations to the agency with regard to use of these assets. Her contribution to this effort will have national implications for the agency.

I highly recommend Shahnoor Khan for a Federal Clerkship. I would be happy to further discuss her qualifications based on the incredibly positive experience I had with her during her internship. Please do not hesitate to contact me at the email or number below.

Bellanne Markizon Weitz
Assistant Chief Counsel, acting
Chief Counsel's Office
Transportation Security Administration
202-821-3576
Bellanne.Weitz@tsa.dhs.gov

AMERICAN UNIVERSITY
WASHINGTON, DC

October 24, 2022

Dear Judge:

I am writing this letter on behalf of Shahnoor Khan's application to serve as a law clerk in your chambers. Shahnoor was a student in my Appellate Advocacy course in the fall of 2021. Based on my interactions with Shahnoor, I recommend her for a clerkship with you.

My Appellate Advocacy course introduces students to appellate processes, procedures, and structures, including written and oral advocacy and judicial decision-making in federal appellate courts. As part of the course, the students learn about federal appellate courts' design, rules, and jurisdiction; doctrines governing access to federal appellate courts; and the standards and scope of review these courts use.

For this course, students write a brief on a pending case in a federal appellate court, observe and write an analysis of the oral argument in that case, and present an oral argument based on a different pending federal appellate case. Through the students' class participation and performance on the written assignments and oral argument, I develop a good sense for their interest in clerking and their ability to perform the responsibilities of a law clerk.

Shahnoor was a strong student in my Appellate Advocacy class. She was one of the most effective contributors to our class discussions, regularly offering insightful comments about both oral and written approaches to advocacy in appellate courts. Shahnoor also did an excellent job in her oral argument, showing a clear command of the legal issues in the case and an ability to present them clearly, concisely, and persuasively. Throughout our course, Shahnoor demonstrated a deep interest in how federal courts works and, in our discussions, an eagerness to learn more by serving as a law clerk.

Based on her performance in my course, I believe that Shahnoor would be a strong addition to your chambers and that you would enjoy working with her.

If I can be of any further assistance or answer any questions, please do not hesitate to reach out to me at 202-885-2164 or sethg@american.edu.

Sincerely,

Seth Grossman

Seth Grossman

Professorial Lecturer
Vice President of People and External Affairs &
Counselor to the President
American University

June 01, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write this recommendation on behalf of Ms. Shahnoor Khan. Shahnoor is intelligent, compassionate, enthusiastic, organized, and committed to task completion. Her work ethic, attention to detail, and legal skills would make her an ideal law clerk.

In Fall 2020, Shahnoor was my Contracts student at American University, Washington College of Law ("AUWCL"). Unlike the traditional 1L Contracts class, which is typically organized around reading and discussing cases, my class, in addition to the case method, employs weekly problem sets that require the students to apply what they have learned to hypothetical fact patterns. Each week, students must complete in writing answers to 2-4 hypothetical problems. Shahnoor's work on these problems was exemplary and showed more effort and thought than most of her classmates. In class, Shahnoor was always on task; she paid attention (even though the class was online that year) and frequently volunteered in class. Each time she speaks, both inside and outside of class, her comments show that she has fully considered all relevant legal issues. Shahnoor received an A- in the class. She takes each assignment incredibly seriously, and she puts her all into everything she does.

I also teach Legal Rhetoric, the first-year legal writing, research, and citation class. Shahnoor was not in my class, but I hold three optional, supplemental program-wide workshops each year: one on citation, one on writing strategies, and one on exam review. Students in other Legal Rhetoric classes (there are approximately 30 sections) may choose to attend these workshops. Shahnoor voluntarily attended each one, once again showing her steadfast commitment to learning her craft. Shahnoor is a well-rounded individual--a pleasure to teach. She is kind and considerate – an increasing rarity in law students.

I maintained a close relationship with Shahnoor during her second year of law school, as I was the Acting Director of the Legal Rhetoric Program, and Shahnoor serves as a Writing Dean's Fellow. Shahnoor regularly met with 1L students to help them with their writing, and students raved about how useful she was in making them better writers.

As a 3L, Shahnoor was the Editor-in-Chief of the American University Law Review. She excelled in this position, as she maintained a high G.P.A of 3.79. This semester, her last at AUWCL, Shahnoor was a student in my in-person Legal Drafting: Family Law Litigation and Practice seminar. Family Law Drafting is a fast-paced class that simulates real-life family law practice. Students represent multiple "clients" in a variety of family law issues, and they write numerous litigation-based documents, such as discovery, motions, settlement agreements, and complaints. They also do a mock settlement conference and a mock mediation session. Shahnoor earned an A in this class, the highest grade in the class! Once again, she was on task, frequently volunteered, and consistently paid attention. Through the years, I have been very proud and pleased to see how Shahnoor has continued to develop as a writer, student, and future lawyer.

Shahnoor is one of the most well-grounded law students that I have ever met. Shahnoor takes her schedule in stride, confidently and competently performing each role without sacrificing humor, humility, or academic success.

No matter her ultimate specialty, Shahnoor has the academic, organizational, and personal skills to succeed in any endeavor. Based on her performance in two of my classes, I am confident that you would be gaining an asset by hiring Shahnoor as a law clerk. Please let me know if I can be of further assistance, as I have nothing but positive things to say about Shahnoor.

Very truly yours,

THE AMERICAN UNIVERSITY
WASHINGTON COLLEGE OF LAW

David H. Spratt
Associate Director, Legal Rhetoric Program
Professor of Legal Rhetoric

SHAHNOOR KHAN

New York, NY • (917) 565 7906 • shahnoor.khan@student.american.edu • linkedin.com/in/shahnoorkhan

The following writing sample is an appellate brief seeking to reverse a Rule 50(a) motion for Judgment as a Matter of Law, written for my Spring 2021 Legal Research and Writing course. While I wrote many briefs and memoranda during my legal experiences at the United States Department of Justice, and the Department of Homeland Security, my supervisors have prohibited me from sharing any written material from those offices. Therefore, this is the only brief from my law school career that I am permitted to share.

In this fictitious case, Kerry Leighton, the Appellant, owned an ice cream business. The business offered factory tours for private events. Earnest MacMillan, the Appellee, hosted his child's birthday party at the ice cream parlor and was dissatisfied with his factory tour; he left a very poor and inaccurate Yelp review. Ms. Leighton accordingly initiated a defamation action. I represented the Appellants, Kerry Leighton, and the Frozen Cow. This was a partnered assignment, and each of us focused on one of the major issues. I covered the first issue, which was whether Mr. Macmillan's statement was protected by the First Amendment to the United States Constitution. The sub-issues that arose were whether Macmillan's statement was factually true, and whether Macmillan's statement was a non-actionable opinion. I have omitted from the sample all sections of the document that I did not solely write. Accordingly, to reduce the length of the document, the table of authorities, statement of jurisdiction, statement of the case, and my partner's topic areas have been omitted.

(sample begins on the next page)

Very Respectfully,

Shahnoor Khan

STATEMENT OF THE ISSUES

I. Under the First Amendment, is Mr. Macmillan's statement factually true, when it asserted that the tour was poorly planned, lacked flavor development, and was rudimentary at best, considering its verifiability, effect on readers, and presence of hidden negative facts?

II. Under the First Amendment, does Mr. Macmillan's statement constitute an actionable opinion, when it asserted that the tour was poorly planned, lacked flavor development, and was rudimentary at best, considering that it may have implied negative facts, such as that Ms. Leighton does not produce high quality ice cream?

ARGUMENT

STANDARD OF REVIEW

In the Colorado District Court, a Rule 50(a) motion for a judgment as a matter of law is granted only where the proof is so overwhelmingly preponderant in favor of the movant as to permit no other rational conclusion. Fed. R. Civ. P. 50(a); *Sandoval v. Unum Life Ins. Co. of Am.*, No. 17-cv-0644, 2019 U.S. Dist. LEXIS 70891 at 2 (D. Colo. Apr. 26, 2019). Appellate courts review de novo a district court's decision to grant or deny a Rule 50(a) motion for judgment as a matter of law, applying the same standards as the district court. *Elm Ridge Expl. Co., LLC v. Engle*, 721 F.3d 1199, 1216 (10th Cir. 2007).

I. The District Court erred in granting the Motion for Judgment as a Matter of Law, because Mr. Macmillan's statement is not protected by the First Amendment; the statement is not protected, because it is neither factually true nor a non-actionable opinion.

The First Amendment protects factually true and non-actionable opinions that do not contain more than minor inaccuracies. *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 9 (1990). The first

issue pertains to whether Mr. Macmillan's statement is factually true, and factors to consider include verifiability and effect on readers as compared to the truth. The second issue asks whether Mr. Macmillan's statement is a non-actionable opinion, and factors such as the presence of negative implications or its perception as an opinion will be considered.

A. Mr. Macmillan's statement is not factually true, because it is verifiable as false and contains inaccuracies that would leave a different impact on the reader than the plainly stated truth would.

A statement is factually true when it is verifiable, and any minor inaccuracies that it contains would not leave a different effect on the reader than that of the plainly stated truth. *See Masson v. New Yorker Mag. Inc.*, 501 U.S. 496, 523 (1991); *Milkovich*, 497 U.S. at 9; *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1134 (10th Cir. 2017); *Keohane v. Stewart*, 882 P.2d 1293, 1300 (Colo. 1994).

If a statement is factually true, then it is verifiable and can be proven or disproven. In *Milkovich*, an editorial implied that the plaintiff, a high school coach (private figure), lied under oath. 497 U.S. at 9. The Supreme Court held that verifiability refers to whether an utterance is capable of proof or disproof. *Id.* at 22 (reversing and remanding summary judgment for the defendant journal). The Supreme Court of Colorado addressed the issue in *Keohane*, where the defendant city councilman asserted that the plaintiff-judge was involved in a criminal conspiracy, which is why the judge did not recuse himself in a sexual assault case. 882 P.2d at 1300 (holding that the councilman's statements were actionable as defamatory). The court found that the assertions were verifiable, because they could be proven as true or false upon an investigation. *Id.* Conversely, in *NBC Subsidiary (KCNC-TV) v. Living Will Ctr.*, the defendant broadcasting company aired a medical ethicist's opinion on living will packets and their fiduciary value. 879 P.2d 6, 12 (Colo. 1994). The ethicist's statements included the phrases "I

think" and "not worth paying for." *Id.* at 8. The court found that these statements were not verifiable, because they were too vague to be proven or disproven as true. *Id.* at 15 (ordering summary judgment for NBC).

A statement is factually true when any minor inaccuracies that it contains do not leave a different effect on the reader than the plainly stated truth would. In *Broker's Choice*, a television program exposed the allegedly deceptive practices of insurance agents preying on senior citizens. 861 F.3d at 1134. The court affirmed the case's dismissal and established that an untrue statement would have a different effect on the reader than the pleaded truth would. *Id.* (holding that because the allegations were not false, they would not leave a different effect on an objective reader than the truth would). In *Anderson v. Colo. Mountain News Media Co.*, a newspaper published statements about "schemes" that the plaintiff's late husband had been involved with. No. 18-CV-02934-CMA-STV, 2019 WL 6888275, at *1, *8 (D. Colo. Dec. 19, 2019). The court held that the necessary inquiry was whether the challenged statement produced a different effect on the reader than that which the literal truth would have. *Id.* (dismissing two claims for negligence while upholding two claims for defamation as a matter for trial). In *SG Int. I Ltd v. Kolbenschlag*, an environmental activist was sued for stating that the plaintiff mining corporation colluded with its lessors. 452 P.3d 3, 8 (Colo. App. 2019). The court found that the defendant's statements were factually true because any minor inaccuracies contained therein would not render a different effect on an objective reader than the literal truth would have. *Id.* (affirming summary judgment for the defendant). In *Masson*, a magazine altered and published remarks made by the plaintiff during an interview regarding his interests in Freudian psychology. 501 U.S. at 502. The Court held that minor inaccuracies do not render a statement factually untrue,

because such inaccuracies do not leave a different impression on objective readers than the literal truth does. *Id.* at 523 (reversing summary judgment for the magazine and remanding).

Mr. Macmillan's statement was not factually true, because it could be proven to be false. In *Milkovich*, the defendant's editorial implied that the plaintiff broke a law. 497 U.S. at 22. Like in *Milkovich*, where an investigation could have verified the accuracy of the defendant's statement, such an inquiry would also prove the inaccuracy of Mr. Macmillan's statement; the court could investigate into the appellant's planning process for the tour and find that it was not poorly planned, contrary to Mr. Macmillan's assertion. *Id.*; R. at 13 (Leighton's Test.). Likewise, in *Keohane*, the councilman's allegations that the plaintiff was involved in a conspiracy to not recuse himself from a sexual assault case were capable of being verified upon an investigation, which is also how Mr. Macmillan's statements could be disproven. 882 P.2d at 1293. During an inquiry into the planning process, the appellant could prove that countless hours were devoted to the planning and execution of The Frozen Cow Factory Tour, contrary to Mr. Macmillan's assertion. R. at 13 (Leighton's Test.). This is dissimilar from the ethicist's statements in *NBC Subsidiary*, which used the phrase "I think," and lacked any type of specific or factual assertion. 879 P.2d at 8 (holding that the statements were too vague to be actionable). Unlike the ethicist's statements in *NBC Subsidiary*, Mr. Macmillan's statements attacked specific elements of the factory tour and its execution. *Id.*; R. at 4 (Compl. ¶ 8), 7 (Answer ¶ 8).

Mr. Macmillan's statement is not factually true, because its inaccuracies leave a different impression on readers than the plainly stated truth would. Unlike in Broker's Choice, where the demonstration of deceptive practices by insurance agents did not leave a different impression on viewers than the truth would have, Mr. Macmillan's statements lead a reader to believe that the factory tour was poorly planned and executed; this impression is different from the truth, because

the truth would give readers the impression that a significant amount of time was dedicated to developing The Frozen Cow Factory Tour. 861 F.3d at 1081; R. at 13 (Leighton's Test). Likewise, in *Anderson* the court held that statements regarding the plaintiff's late husband's "schemes" and business practices had to render a different conclusion by readers as opposed to the literal truth in order to be untrue. 2019 WL 6888275 at *6. Applying the court's inquiry from *Anderson* here demonstrates that the impression left by Mr. Macmillan's statement was different from the truth, which is that the tour was not poorly planned or executed. Id.; R. at 13, (Leighton's Test.), 24 (Johnson's Test.). Unlike in *SG Ints. Ltd.*, where the defendant activist's statements about the mining corporation's collusion were true, because they did not leave a different impression on readers, Mr. Macmillan's statements could not be true, because they leave a different impression on readers than the truth would. 452 P.3d at 8; R. at 14 (Leighton's Test.), 24 (Johnson's Test.). In *Masson*, where a magazine altered the plaintiff's statements regarding his interests in Freudian psychology, the Court held that the alterations could leave a different impact on readers than the plainly stated truth. 501 U.S. at 525. Like the defendant in *Masson*, Mr. Macmillan's statement contains inaccuracies that leave a more negative impression on readers than the truth would. Id.; R. at 13 (Leighton's Test.), 22 (Johnson's Test.). Based on Mr. Macmillan's statement, a reasonable reader would take his business elsewhere; whereas if that reader were presented with the truth, he would learn that The Frozen Cow is committed to producing high quality ice cream and is dedicated to flavor development and expansion.

B. Mr. Macmillan's statement is not a non-actionable opinion, because it would not reasonably be understood as an opinion, and it implies hidden negative facts.

A statement is a non-actionable opinion if it is reasonably understood as an opinion or if it does not imply hidden negative facts. *See Air Wis. Airlines Corp. v. Hoeper*, 571 U.S. 237, 256 (2014); *Bundren v. Parriott*, No. 06–3270, 2007 WL 2405258, at *1, *7 (10th Cir. Aug. 24,

2007); *Jefferson City Sch. Dist. No. R-1 v. Moody's Inv.'s Serv.*, 175 F.3d 848, 856 (10th Cir. 1999); *Gordon v. Boyles*, 99 P.3d 75, 81 (Colo. App. 2004).

A statement is a non-actionable opinion if it is reasonably perceived to be an opinion by objective readers. In *Gordon*, a police officer sued a talk show for statements made on air about the officer's alleged marital and professional misconduct. 99 P.3d at 78. The court noted that because the opinion was asserted as fact, and reasonable listeners could have concluded who specifically the statement was about, the opinion would have been actionable had it been untrue. *Id.* at 82 (affirming summary judgment for the defendants only because the plaintiff failed to show that the opinion was factually inaccurate); *see also Nat'l Ass'n. of Letter Carriers v. Austin*, 418 U.S. 264, 271 (1974) (holding that statements meant to be protected by the First Amendment are those that cannot reasonably be interpreted as stating actual facts). Conversely, in *Keohane*, where the defendant councilman's assertions were capable of being verified, the court held that the latter part of the inquiry dealt with whether a reasonable person would believe the defendant's assertion to be a fact or an opinion. 882 P.3d at 1304. The court reasoned that because an objective listener could have reasonably perceived the councilman's claims about the plaintiff judge to be factual, the plaintiff had a legitimate claim to be addressed at trial. *Id.* at 1305. In *Jefferson*, a school district sued a bond rating service for comments regarding the trustworthiness of the school's bonds. 175 F.3d at 850. The court analyzed the phrasing, context, medium, and surrounding circumstances of the statement. *Id.* The court held that because the statements were clearly expressed as the service's opinion, the service had not been hired by the school to evaluate the bonds, and did not personally invest in the bonds, the statements would clearly be understood as opinions to objective readers. *Id.* at 860. Similarly, in *Bundren*, Dr. Bundren filed suit against Dr. Parriott for statements that the latter made in an expert report.

2007 WL 2405258, at *7. The court of appeals granted summary judgment to the defendant, Dr. Parriott, because the statements were clearly asserted as opinions in the matter of an expert witness' report. *Id.*

A statement is a non-actionable opinion if it does not imply hidden negative facts. In *Broker's Choice*, where the defendant broadcasting company aired footage and statements regarding the plaintiff insurance company's practices and seminar, the court found that the program was not actionable, in part because it did not make any hidden implications as to the plaintiff's conduct. 861 F.3d at 1081 (affirming the lower court's grant of the motion to dismiss). Likewise, in *SG Int. Ltd. I*, where the defendant activist made negative statements about the plaintiff mining company, the court held that because there were no hidden allegations or implications within the statement, it constituted a non-actionable opinion. 452 P.3d at 8 (holding that in order for a statement to be actionable, the hidden implications must have harmed the plaintiff's reputation). Similarly, in *Air Wisconsin*, the Supreme Court examined statements made by a defendant airline employee and held that the harm in defamation law arises from the effects on the plaintiff's reputation that result from the statement's negative implications. 571 U.S. at 252. The defendant employee alleged that the plaintiff was disorderly and armed in an airport, and the Court held that based on the plaintiff's own admitted behavior, the defendant's statement did not contain the necessary hidden implications. *Id.* at 256. In *Ollman*, a professor filed suit against columnists who alleged that he was rejected from a department position because of his socialist views. 750 F.2d at 971. The court found that the statements did not imply any negative facts, and that they expressly asserted facts that the plaintiff had already publicly acknowledged his association with. *Id.* at 988.

Mr. Macmillan's statement is not a non-actionable opinion, because it would not reasonably be perceived to be an opinion by objective readers. Mr. Macmillan's statement is unlike the one in *Gordon*, where but for the statement's accuracy, the defendant's opinion would have been actionable, because it was asserted as fact, and listeners could have easily concluded who the statements were referring to. 99 P.3d at 82. This is dissimilar from Mr. Macmillan's statement because his statement can be proven as factually inaccurate; therefore, because objective readers could clearly conclude who Mr. Macmillan's statement was about and perceived it to be true, it is actionable. R. at 4 (Compl. ¶ 14), 8 (Answer ¶ 14). Mr. Macmillan's statement mentioned The Frozen Cow by name, and any reader could reasonably perceive his statement to be factual. *Id.* Like in *Keohane*, where the defendant councilman made negative statements about the plaintiff, Mr. Macmillan asserted specific and negative things about The Frozen Cow. *Id.*; 882 P.3d at 1304. In *Keohane*, the court held that the defendant's statement could reasonably have been perceived as fact by objective listeners because of the specificity and surrounding circumstances. 882 P.3d at 1305. Likewise, Mr. Macmillan's allegations could reasonably be perceived as facts by readers because of his specificity and personal experience with the factory tour. R. at 4 (Compl. ¶ 14), 8 (Answer ¶ 14). Unlike in *Jefferson*, where the defendant bond rating service had no personal experience with the plaintiff school and expressly advertised its statement as an opinion, Mr. Macmillan told readers about his experience at the factory tour and never posted that his statements indicated an opinion, rather than a fact. *Id.*; 175 F.3d at 860. Unlike in *Bundren*, where the defendant physician literally prepared the report that was the subject of the suit as part of his expert opinion in order to testify as a witness, Mr. Macmillan never indicated that his statements were a matter of opinion, rather than fact. 2007 WL 2405258, at *7; R. at 4 (Compl. ¶ 14), 8 (Answer ¶ 14).

Mr. Macmillan's statement is not a non-actionable opinion because it implies hidden negative facts. The statements made in *Broker's Choice* were not actionable because they openly documented the truth regarding the insurance company's practices and made no implications as to any other matter. 861 F.3d at 1081. This is dissimilar from Mr. Macmillan's statement, because although he expressly attacked the appellant's business, he also implied that her ice cream making skills are limited, meaning that she fails to provide high quality ice cream to her clients. R. at 4, 5 (Compl. ¶¶ 16-17). Unlike in *SG Ints. Ltd. I*, where the defendant's statement constituted factually true allegations about the plaintiff mining company and did not contain negative implications, Mr. Macmillan's statements allege falsities; he implies that the plaintiff misrepresented the nature of the ice cream tour, and that her website is inaccurate. 452 P.3d at 8; R. at 4 (Compl. ¶ 14), 8 (Answer ¶ 14). In *Air Wisconsin*, the plaintiff expressly exhibited certain behaviors at an airport, which were reported to a government agency. 571 U.S. at 256. Unlike in *Air Wisconsin*, where the plaintiff's public conduct caused the defendant to make statements, Ms. Leighton was not Mr. Macmillan's tour guide, nor did she misrepresent the nature of the tour online. *Id.*; R. at 5 (Compl. ¶ 19), 17 (Leighton's Test.). Unlike in *Ollman*, where the plaintiff professor previously acknowledged his political affiliation, which was published in the defendant columnists' newspaper, Ms. Leighton has never affirmed the truth of Mr. Macmillan's statements. 750 F.2d at 988 (holding that because the plaintiff affirmed the truth of the columnists' statements, they were not actionable); R. at 14 (Leighton's Test). Mr. Macmillan's statement is not a non-actionable opinion because it would not reasonably be understood as an opinion, and it implies hidden negative facts.

Applicant Details

First Name	**Stephany**
Last Name	**Kim**
Citizenship Status	**U. S. Citizen**
Email Address	**sk4836@columbia.edu**
Address	**Address** Street **170 West 74th Street, #901** City **New York** State/Territory **New York** Zip **10023**
Contact Phone Number	**(925) 989-5033**

Applicant Education

BA/BS From	**Cornell University**
Date of BA/BS	**December 2019**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 17, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Journal of Law and the Arts**
Moot Court Experience	**Yes**
Moot Court Name(s)	**American Intellectual Property Law Association Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Emens, Elizabeth
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Stephany S. Kim
170 West 74th Steet, Apt. 901
New York, NY 10023
925-989-5033
sk4836@columbia.edu

June 23, 2023

The Honorable Kiyo Matsumoto
United States District Court
Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am a recent graduate of Columbia Law School, and I write to apply for a clerkship in your chambers beginning in 2025.

Starting in September 2023, I will be an associate at Kirkland & Ellis in their Copyright, Trademark, Internet & Advertising Litigation and Counseling group. I am seeking a judicial clerkship in your chambers for the 2025–26 term or any term thereafter.

Enclosed please find my resume, transcript, and writing sample, along with letters of recommendation from Professors Elizabeth Emens (212-854-8879, eemens@law.columbia.edu) David Pozen (212-854-0438, dpozen@law.columbia.edu), and Richard Briffault (212-854-2638, rb34@columbia.edu).

Thank you for your consideration. Please do not hesitate to contact me should you need any additional information.

Respectfully,

Stephany S. Kim

STEPHANY S. KIM

170 West 74th Street, Apt. 901, New York, NY 10023
(925) 989-5033 • sk4836@columbia.edu

EDUCATION

Columbia Law School, New York, NY
J.D. received May 2023
Honors: James Kent Scholar (2L–3L); Harlan Fiske Stone Scholar (1L)
Butler Fellow (half-tuition merit scholarship)
American Intellectual Property Law Association Moot Court, National Finalist
Activities: *Columbia Journal of Law and the Arts*, Staff Editor
Research Assistant to Professor David Pozen (Summer 2022–Fall 2022)
Research Assistant to Professor Elizabeth Emens (Fall 2021–Spring 2022)
Legal Methods II Teaching Assistant to Professor Richard Briffault (Fall 2022)
Contracts Teaching Assistant to Professor Elizabeth Emens (Fall 2021)
Society for Immigrants & Refugee Rights, IRAP Project Director

CORNELL UNIVERSITY, New York, NY
B.A. received December 2019
Majors: English & Government
Honors: Pauline and Irving Tanner Dean's Scholar
Research: "Translations in American Theater: *God of Vengeance* and *Indecent*"
Activities: *The Cornell Daily Sun*, News Editor

EXPERIENCE

United States District Court for the Southern District of New York January 2023–April 2023
Judicial Extern to the Honorable Valerie E. Caproni
Researched and drafted legal memoranda and judicial opinions for immigration, habeas corpus, and unfair competition cases. Proofread and cite-checked opinions. Attended hearings and trials.

Kirkland & Ellis LLP, New York, NY
Summer Associate (offer accepted) May 2022–July 2022
Conducted legal research and drafted memoranda to support the firm's Copyright, Trademark, Internet & Advertising Litigation and Counseling group. Shadowed depositions, oral arguments, and meet-and-confers. Participated in a mock trial developed by the National Institute of Trial Advocacy.

Knight First Amendment Institute, New York, NY
Legal Extern January 2022–April 2022
Drafted legal memoranda on topics in First Amendment law. Brainstormed theory of a case, including causes of actions and jurisdiction. Assisted fact-finding research for joint stipulation. Cite-checked and proofread complaint and Freedom of Information Act (FOIA) requests.

Kernochan Center for Law, Media, and the Arts, New York, NY
Research Assistant July 2021–January 2022
Researched and drafted legal memoranda on topics in copyright law. Compiled case summaries, images, and copyright information for the Visual Arts Infringement Project. Prepared materials for fall symposium.

Carnegie Hall, New York, NY
Legal Intern May 2021–July 2021
Researched and edited COVID-19 protocols in compliance with state and local regulations. Drafted executive summaries on ADA accommodations, liability waivers, charitable solicitation law, and donor acknowledgment. Reviewed lease terms for rent obligations of tenants and subtenants.

LANGUAGE SKILLS: Korean (native), Spanish (basic)
INTERESTS: Bicycle touring, choral singing, musical theater

Columbia Law School

Registration Services

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Program: Juris Doctor

Stephany S Kim

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6407-1	Advanced Constitutional Law: 1st Amendment	Healy, Thomas Joseph	3.0	A-
L6293-2	Antitrust and Trade Regulation	Wu, Timothy	3.0	CR
L6341-1	Copyright Law	Wu, Timothy	3.0	A
L6661-1	Ex. Federal Court Clerk - SDNY	Radvany, Paul	1.0	CR
L6661-2	Ex. Federal Court Clerk - SDNY - Fieldwork	Radvany, Paul	3.0	CR
L6672-1	Minor Writing Credit	Richman, Daniel	0.0	CR

Total Registered Points: 13.0

Total Earned Points: 13.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6425-1	Federal Courts	Metzger, Gillian	4.0	A-
L6680-1	Moot Court Stone Honor Competition	Bernhardt, Sophia	0.0	CR
L6274-1	Professional Responsibility	Mastando, John	2.0	A
L9323-1	S. Intellectual Property in the Digital Age	Parness, Hillel	2.0	A
L6685-1	Serv-Unpaid Faculty Research Assistant	Pozen, David	2.0	A
L6162-1	Unfair Competition & Related Topics in Intellectual Property	Long, Clarisa	4.0	A

Total Registered Points: 14.0

Total Earned Points: 14.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-1	Evidence	Capra, Daniel	4.0	B+
L6299-1	Ex. The Knight First Amendment Institute	DeCell, Caroline	2.0	A
L6299-2	Ex. The Knight First Amendment Institute - Fieldwork	DeCell, Caroline	3.0	CR
L6610-1	Journal of Law and the Arts		0.0	CR
L6781-1	Moot Court Student Editor II	Bernhardt, Sophia	2.0	CR
L6292-1	State and Local Government Law	Briffault, Richard	3.0	A

Total Registered Points: 14.0

Total Earned Points: 14.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6610-1	Journal of Law and the Arts		0.0	CR
L6169-1	Legislation and Regulation	Briffault, Richard	4.0	A
L6681-1	Moot Court Student Editor I	Bernhardt, Sophia	0.0	CR
L6338-1	Patents	Long, Clarisa	3.0	A-
L6685-1	Serv-Unpaid Faculty Research Assistant	Emens, Elizabeth F.	2.0	A
L6822-1	Teaching Fellows	Emens, Elizabeth F.	4.0	CR
L6674-1	Workshop in Briefcraft [Major Writing Credit - Earned]	Bernhardt, Sophia	2.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6863-1	AIPLA Moot Court	DeMasi, Timothy; Lebowitz, Henry; Strauss, Ilene	0.0	CR
L6108-4	Criminal Law	Seo, Sarah A.	3.0	B+
L6256-1	Federal Income Taxation	Raskolnikov, Alex	4.0	A-
L6130-5	Legal Methods II: Methods of Persuasion	Genty, Philip M.	1.0	CR
L6121-25	Legal Practice Workshop II	DeMasi, Timothy; Lebowitz, Henry	1.0	HP
L6116-4	Property	Purdy, Jedediah S.	4.0	B+
L6118-1	Torts	Merrill, Thomas W.	4.0	A-

Total Registered Points: 17.0

Total Earned Points: 17.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-3	Civil Procedure	Genty, Philip M.	4.0	B+
L6133-5	Constitutional Law	Glass, Maeve	4.0	A-
L6105-3	Contracts	Emens, Elizabeth F.	4.0	A
L6113-4	Legal Methods	Briffault, Richard	1.0	CR
L6115-21	Legal Practice Workshop I	Cogburn, Christopher Stone; Izumo, Alice	2.0	P

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 88.0

Total Earned JD Program Points: 88.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2022-23	James Kent Scholar	3L
2021-22	James Kent Scholar	2L
2020-21	Harlan Fiske Stone	1L

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	2.0

June 12, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing to recommend Ms. Stephany Kim for a clerkship in your chambers. Ms. Kim is a very talented and thoughtful law student who is also a terrific writer. I expect she will be an excellent clerk.

I know Ms. Kim principally in three ways: as a student in my Contracts class in Fall 2020; as my Research Assistant from Spring to Fall 2021; and as a Teaching Assistant for my Fall 2021 Contracts course. I therefore have a very good basis on which to comment on Ms. Kim's performance and prospects.

My introduction to Ms. Kim came through first-year Contracts in the Fall of 2020. The grades in that course were based on a difficult anonymously graded exam, which combined multiple-choice questions and essays. Students were required to write two essays: one analyzing traditional legal problems in order to predict how a court would decide them, and a second evaluating the conceptual underpinnings of contract law and applying them to specific doctrines. The exam also required students to apply their knowledge of doctrine to solve problems on a set of challenging multiple-choice questions. Ms. Kim earned an "A-" grade on the Contracts exam, excelling on all portions, especially multiple-choice and the policy essay. I made a specific note to myself about the high quality of her writing throughout the exam.

Based on this outstanding performance in Contracts, I invited Ms. Kim to become my Research Assistant (RA) beginning in the Fall of 2021 and, due to her excellent work, continuing through the Spring of 2022. She earned an "A" in this position.

My RAs submit written memos to me, and they also present their findings to each other and to me in periodic RA Briefing Meetings. Ms. Kim conducted interdisciplinary research on widely varying topics related to disability law and disability discrimination, in particular. She did an excellent job assisting with the final edits on two manuscripts of mine. She also wrote terrific memos and presented her work effectively in the Briefing Meetings.

I was so impressed by Ms. Kim's combination of analytic and organizational skills that I asked her if she would assume the role of Lead RA. Lead RA is a role that I designate only sometimes, when a period of intense focus in my own work coincides with an RA in my sights who can execute it effectively. Succeeding in this role requires not only outstanding substantive skills, but also the ability to collaborate and lead, because the Lead RA helps to manage other RAs and organize the RA team's work. Ms. Kim did a terrific job as Lead RA staying on top of things and preparing me and the team for RA Briefing Meetings.

Ms. Kim was such an effective Contracts student and RA that I also invited her to serve as a Teaching Assistant for my Contracts class in the Fall of 2021. The responsibilities in this role include holding TA sessions once a week to review material with students, supporting the first-year students through the transition to the first semester of law school, supporting my teaching work in and out of the classroom, and reviewing and providing feedback on the midterm exams. Though this is not a graded position, I could see that Ms. Kim also performed this role very effectively.

Ms. Kim has had a highly successful law school career so far, both inside and outside the classroom. She has earned a Butler Fellowship, which is a merit-based half-tuition scholarship, James Kent Scholar status, and Harlan Fiske Stone Scholar status. She has served as a TA for multiple classes, including my own, and as an RA for multiple professors, including me. She has also served as a judicial extern for the Honorable Valerie E. Caproni at the Southern District of New York, an experience she particularly enjoyed, and for the Knight First Amendment Institute.

Beyond the classroom and externships, she was a national finalist for the American Intellectual Property Law Association Moot Court and a participant in the Harlan Fiske Stone Moot Court. She was a staff editor for the Journal of Law & the Arts and chapter director for the Society for Immigrant & Refugee Rights. She has also been a member of Asian-Pacific American Law Students Association, Empowering Women of Color, and Columbia OutLaws.

In her summers, Ms. Kim has been further honing her impressive skills. During the summer after her 1L year, she was an intern for the General Counsel of Carnegie Hall, where she researched and edited the organization's COVID-19 protocols for legal compliance; drafted executive summaries on ADA accommodations, liability waivers, charitable solicitations, and donor acknowledgement; and reviewed lease terms for rent obligations of tenants and subtenants to minimize the risk of future litigation. During the summer after her 2L year, Ms. Kim was a summer associate at Kirkland & Ellis in their New York office.

Her excellent writing and organizational skills, which I have seen on her exam and in her work as a Research Assistant, Lead Research Assistant, and Teaching Assistant, should not be surprising, given her relevant experiences prior to law school. Most notably, Ms. Kim served as the news editor for her college newspaper The Cornell Daily Sun throughout her undergraduate career. In this role, she published more than 40 articles, both breaking news and long-form investigation, and edited and proofread articles for publication every weekday. Through this role, Ms. Kim honed her eye for detail as well as the organizational skill and flexibility required to meet the demands of daily journalism.

Elizabeth Emens - efe2103@columbia.edu - 212-854-8879

On a personal note, I might add that Ms. Kim is particularly motivated in her work by wanting to give back to her family, who have made great sacrifices, as immigrants, to provide her the chance to be a first-generation professional.

In short, Ms. Kim is smart, thoughtful, organized, and collegial, as well as being an excellent writer. I believe she will be an excellent clerk, and I recommend her to you most strongly.

Let me know if I can provide any other information. I would be happy to speak further. I am on leave until January beginning this Summer, but recommendations are a priority, and I can generally be reached through my assistant, Kiana Taghavi (ktaghavi@law.columbia.edu), or on my cell phone at 718-578-9469.

Sincerely,

Elizabeth F. Emens

Elizabeth Emens - efe2103@columbia.edu - 212-854-8879

COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

June 12, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Re: Stephany Kim

Dear Judge Matsumoto:

I am writing to recommend Stephany S. Kim of the Columbia Law School Class of 2023 to you for a clerkship. Stephany has been an outstanding student. She is smart and articulate, and has a terrific work ethic. She has extensive research and writing experience and an impressive academic record. I am sure she will be a wonderful law clerk.

I taught Stephany in three courses – Legal Methods in the Fall 2020 term, Legislation and Regulation in the Fall 2021 term, and State and Local Government Law in the Spring 2022 term. In each of these classes, Stephany was an active participant in class discussions. She asked good questions, and was consistently interested in digging deeper into the material. I was particularly impressed by her work in Leg-Reg. That course covers a lot of ground, dealing with complex is-sues in statutory interpretation and administrative law, and had a very large enrollment that seemed to discourage other students from participating. Stephany, who had no background in the area, was not daunted by the size of the room or the density of the material. She regularly spoke up to pursue difficult points, pose probing questions, and confirm that she had mastered the material. Legal Methods – our Introduction to Law course – is taught as a pass-fail course without a final exam. In the other two courses, Stephany wrote excellent exams – one of the top two out of more than one hundred students in Leg-Reg – and unsurprisingly received A's in both.

Based on her excellent work, I hired Stephany to be a Teaching Assistant for me in Legal Methods. She played an important role in meeting with and supporting her students in their stressful first days of law school, going over the material with them calming their nerves, and re-viewing their writing. She did an exceptional job.

Stephany's strong performance in my classes was not unusual. She was honored as a Har-lan Fiske Stone Scholar in her 1L year and as a James A. Kent Scholar – our highest academic honor -- in both her second and third years. Several of my colleagues have also recognized Stephany's strengths. She has been a Teaching Assistant in another course, and a Research Assistant for two professors.

In addition to her classroom work, Stephany deepened her legal research and writing skills through her work with the American Intellectual Property Law Association Moot Court – as a national finalist in her 1L year, and as a student editor and coach in her 2L year, which gave her experience drafting a bench memo and editing briefs. She also participated in the Stone Moot Court competition in her 3L year and worked as an extern at the Knight First Amendment Institute and also for Judge Valerie Caproni. These experiences strengthened her research ability and sharpened her writing. She will be starting this fall as an associate at Kirkland & Ellis, on their Copyright, Trademark, Internet and Advertising Litigation and Counseling team.

Stephany is a first-generation immigrant, born and raised in Korea until the age of nine when her family immigrated to California. I am impressed by how much she has accomplished academically, while still also helping her family make the transition to life in the United States.

In my conversations with Stephany, I have consistently found her to be smart, organized, insightful, and serious about her professional development. She also has a very pleasant personality. Based on her strong academic record, research and writing experience, analytical ability, and personal qualities, I enthusiastically recommend Stephany Kim to you for a clerkship. Please call me at 917-359-2250 if I can be of any further assistance to you in assessing Stephany Kim's application.

Sincerely,

Joseph P. Chamberlain
Professor of Legislation

COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

June 12, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Re: Stephany Kim

Dear Judge Matsumoto:

It is my pleasure to recommend Columbia Law School class of 2023 graduate Stephany Kim for a clerkship in your chambers. Stephany is a superstar and has my unqualified support.

This is an unusual clerkship recommendation letter for me, in that I have never taught Stephany or supervised a paper of hers. Last summer, I realized I needed a research assistant to help me track down the papers of, and out-of-court writings by, various Supreme Court Justices for a book I am writing on the constitutional history of the war on drugs. I asked my outgoing RA for a recommendation, and he immediately suggested Stephany, who had quickly developed a reputation (he informed me) as the most capable member of Kirkland & Ellis's summer associate cohort in New York.

Throughout this past academic year, Stephany has performed brilliantly in this RA role. It may not be the most intellectually exciting research endeavor, but prior to hiring Stephany, I was having a hard time finding what many of the Justices had written about drug prohibition and related topics outside of their published opinions. I had given versions of this assignment to two different RAs, in two different semesters, and after weeks of searching they both came up with little of use. These were good RAs, too, but Stephany blew them out of the water. With unfailing diligence, thoroughness, and professionalism, Stephany figured out where all the potentially relevant papers were held, secured access to them, scoured the papers for useful material, and tracked down obscure speeches and other writings by Justices that bore on questions of drug law or policy. (A particular favorite is a 1972 speech by retired Justice Tom Clark in which he urged repeal of the marijuana laws and predicted that the Court was on the verge of invalidating convictions for marijuana possession on substantive due process grounds.) It is not hyperbole to say that Stephany could not have done a better job as my RA.

Given my relationship with Stephany, I am best positioned to speak to her research skills, which as just indicated are prodigious. I assume other recommenders will speak to other attributes, but I can't help but note some other major strengths: Stephany received only A-range grades this past year; she was a national finalist in the intellectual property law moot court; she led a major legal service project for the law school's Society for Immigrants and Refugee Rights; she did substantial work during her 1L summer and 2L fall at the law school's Kernochan Center for Law, Media, and the Arts, whose director still raves about her; and she is a terrific legal writer on top of it all. She also happens to be an avid bicyclist and singer, performing with a community choir in Union Square. And Stephany has achieved all of this without the benefit of family privilege. After her family immigrated from Korea when she was nine, Stephany's parents worked a variety of service jobs at restaurants and malls around Oakland while Stephany helped out and translated for them.

After taking the bar, Stephany will be starting as an associate at Kirkland & Ellis, where she will focus on the IP issues that especially excite her. She is already more than prepared to clerk, but the time at Kirkland will only make her stronger. In sum, Stephany is brilliant on the page and in oral advocacy, a relentless researcher, utterly unentitled, and determined to make the most of her opportunities. I recommend her on the strongest terms.

If I can be of any further assistance, please do not hesitate to contact me.

Respectfully,

David Pozen

David Pozen - dpozen@law.columbia.edu - 2128540438

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Columbia Law School J.D. ’23
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CLERKSHIP APPLICATION WRITING SAMPLE

The following writing sample is a legal memorandum written during my externship at the Knight First Amendment Institute. The memorandum addresses the National Health Institute’s interest in prohibiting off-topic speech through a comment filter on its official social media pages.

The memorandum has been lightly edited for grammar and format by a staff attorney at the Knight Institute. I have received permission from the organization to use this memorandum unredacted as a writing sample for clerkship applications.

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MEMORANDUM

To: Stephanie Krent, Alyssa Morones

From: Stephany Kim

Re: Government's Interest in Prohibiting Off-Topic Speech

Date: 27 April 2022

Questions Presented

1. How do governments that have on/off-topic speech discrimination (ex. during schoolboard meetings) conceptualize its rationale, and how have courts analyzed such prohibitions of off-topic speech?

2. How can we show that these cases are not the same because social media platforms are not like official meetings where there is business to attend to?

Short Answers

1. Courts have held that government entities—such as city councils, county commissions, and school boards—have a legitimate interest in conducting orderly and efficient public meetings. Relatedly, courts have also recognized that the government has a legitimate interest in confining their meeting agendas to certain topics in order to conduct such orderly and efficient meetings. Therefore, courts have generally held that the prohibition of off-topic speech, which may be disruptive and therefore threaten the orderliness and efficiency of a meeting, is facially constitutional. However, absent evidence that the targeted speech was actually disruptive, the Ninth Circuit in particular has refused the government's assertion of such interests in response to an as-applied challenge.

2. A few district court cases have addressed the constitutionality of the prohibition of off-topic comments on government-run social media pages, but none of them address the government's interest in conducting orderly and efficient meetings. Turning to the facts of our case, there are four key features of the NIH's social media pages that suggest that a court is less likely to find the NIH has a legitimate interest in limiting off-topic speech: lack of time/space constraint, lack of clearly defined agenda, the different nature of decorum and civility on social media pages, and NIH's use of keyword blocking rather than deterrence after-the-fact.

Analysis

I. Courts have generally concluded that the government has a legitimate interest in conducting orderly and efficient meetings and limiting meeting agendas.

In a limited public forum like town hall or schoolboard meetings, a government may impose content-based restraints—such as prohibiting "off-topic" speech—if the restraints are aimed at "confining [the] forum to the limited and legitimate purposes for which it was created."

Rosenberger v. Rector and Visitors of Univ. of Virginia, 515 U.S. 819, 829 (1995). Such restrictions must be viewpoint neutral and "reasonable in light of the purpose served by the forum." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). In this context, various government entities have argued, and courts have agreed, that the government has a legitimate interest in (1) conducting orderly and efficient meetings and (2) setting meeting agendas that are limited to certain topics to do so.

A. The government has a legitimate interest in conducting orderly and efficient meetings.

The government has a legitimate interest in hearing "views of others . . . [that] best serve its informational needs while rationing its time" during public meetings. *City of Madison*, *Joint Sch. Dist. v. Wisc. Emp. Rels. Comm'n*, 429 U.S. 167, 176 n.8 (1976) (Stewart, J., concurring).[1] Therefore, courts have generally recognized the "significance of the government's interest in conducting orderly, efficient meetings of public bodies." *Jones v. Heyman*, 888 F.2d 1328, 1332 (11th Cir. 1989).

For example, the Ninth Circuit has explained that "given the nature of a [city] [c]ouncil meeting"—i.e., there is business to attend to within a limited amount of time—the city has an interest in "accomplishing its business in a reasonably efficient manner." *White v. City of Norwalk*, 900 F.2d 1421, 1426 (9th Cir. 1990) (emphasis added). In *White*, the court upheld an ordinance that allowed for the removal of people who engaged in "disorderly conduct which disrupts, disturbs, or otherwise impedes the orderly conduct of any council meeting." *Id*. at 1424.

The Fourth Circuit likewise recognized that the purpose of a county planning commission meeting is for "conducting public business" and that "imposing reasonable restrictions [on disruptive speech] to preserve the civility and decorum" was reasonable in light of that purpose. *Steinburg v. Chesterfield*, 527 F.3d 377, 385 (4th Cir. 2008). In doing so, the court defined "disruptive speech" as speech that "significantly violates" rules of parliamentary order and inhibits the "orderly conduct of a meeting." *Id.* at 386. The court then held that the commission's decision to expel the plaintiff, who had verbally attacked one of the commissioners and made no efforts to relate his comments to the topic at hand, was not unconstitutional. *Id*. at 386.

In this context, there are several forms of disruptive speech that courts have recognized the government can limit, such as repetitive speech, *e.g., Eichenlaub v. Twp. of Ind.*, 385 F.3d 274, 281 (3d Cir. 2004), overly lengthy speech, *e.g., Wright v. Anthony*, 733 F.2d 575, 577 (8th Cir. 1984), and off-topic speech, *e.g., Youkhanna v. City of Sterling Heights*, 934 F.3d 508, 519 (6th Cir. 2019). The following section discusses the government's specific interest in prohibiting off-topic speech in order to conduct orderly and efficient meetings.

B. The government has a legitimate interest in confining meeting agendas to limited topics in order to conduct orderly and efficient meetings.

[1] The subsequent Circuit and district court cases I have read do not explicitly refer to this informational need or rationing of time. Instead, they take for granted that the government has a legitimate interest in orderliness and efficiency in their own right. Moreover, none of the cases I've read disaggregates this interest into specific interests like rationing time, hearing from diverse perspectives, preventing confusion, etc.

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The necessity of conducting orderly and efficient meetings informs the government's legitimate interest in confining meeting agendas to limited topics. The Supreme Court has recognized that "[p]lainly, public bodies may confine their meetings to specified subject." *City of Madison*, 429 U.S. at 176 n.8. Thus, the Ninth Circuit has characterized a city council meeting, for example, as "just . . . a governmental process with a governmental purpose" with an "agenda to be addressed and dealt with." *City of Norwalk*, 900 F.2d at 1425. Therefore, the court there recognized that "in dealing with agenda items, the Council does not violate the [F]irst [A]mendment when it restricts public speakers to the subject at hand." *Id*.; *see also Eichenlaub v. Twp. of Ind.* 385 F.3d 274, 281 (3d Cir. 2004) ("[M]atters presented at a citizen's forum may be limited to issues germane to town government."); *Jones*, 888 F.2d at 1333 ("We believe . . . the mayor's interest in controlling the agenda and preventing the disruption of the commission meeting sufficiently [is] sufficiently significant to satisfy [the] governmental interest prong of the analysis.").

In *Steinburg*, the Fourth Circuit held that a county planning commission is "justified in limiting its meeting to discussion of specified agenda items" in order to facilitate a "orderly conduct of a meeting." 527 F.3d at 385–86. In that case, the county planning commission held a public meeting on whether to grant a developer's request to defer its zoning application. *Id*. at 380. During the meeting, speakers before the plaintiff made little effort to relate their comments to the set agenda but did express their positions on the deferral when prompted by the moderator. *Id.* at 381. In contrast, the plaintiff, during his turn to speak, made no efforts to relate his comments to the deferral, and instead verbally attacked one of the commissioners. *Id*. at 381. After refusing to stay on topic despite repeated reminders from multiple commissioners, the plaintiff was escorted out. *Id*. at 384. In response, the plaintiff brought suit claiming that the commission's action's constituted viewpoint discrimination. The Fourth Circuit upheld the district court's denial of the free speech claim, because the government has a legitimate interest in "preserving civility and decorum," and it had exercised this interest in a viewpoint-neutral and reasonable manner. *Id.* at 385.

Another way of conceptualizing the rational for a limited agenda is that public official meetings "cannot accommodate the sort of uninhibited, unstructured speech that characterizes a public park." *Youkhanna*, 934 F.3d at 518. In *Youkhanna*, the city council set the agenda item to whether it should approve a settlement that would give zoning permission to build a mosque to a nonprofit, and at the beginning of the meeting, informed the public that speakers will be required to stay on point. *Id.* at 513–14. Several plaintiffs were barred from sharing their comments—such as their aversion to living near a mosque or the "preferential treatment" that the nonprofit was getting—because they were deemed irrelevant to the specific topic at hand. *Id*. at 520–21. In response, plaintiffs challenged that the relevance rule was viewpoint discrimination. The court denied this claim, explaining that it could "think of no content-based restriction more reasonable than asking that content be relevant." *Id.* at 519. Then, the court ruled that the rule was not viewpoint discrimination as applied because the plaintiffs' comments were barred not because of their viewpoints but because of their irrelevance to whether the council should approve the settlement or not. *Id*. at 520.

Likewise, in *Fairchild v. Liberty Independent School District*, the Fifth Circuit held that a school board has a "strong and speech-neutral interest in setting an agenda and paths to Board

hearings to avoid irrelevant topics or extended contentious debate." 597 F.3d 747, 760 (5th Cir. 2010). In that case, the school board prohibited the public from naming particular persons during its public comments meeting, because the agenda was to hear comments on board business, not to take action on or adjudicate any specific employee disputes. *Id*. The court upheld this rule as facially constitutional, because the board had a legitimate interest in confining the topic of its meetings. *Id.*

However, the Fifth Circuit also suggested in *Fairchild* that the board's ability to set the agenda is not limitless. The court noted that this would have been a "quite different case" if there were no "alternative paths for expressing this category of protected speech," i.e., public criticisms of specific teachers. *Id.* at 761. Because there was another procedure to express such grievances, the court explained that the Board's rule "ultimately do not constrain by the content of protected speech but rather do no more than limit the time, place, and manner for its expression." *Id*. In other words, the court acknowledged that if the forum it hosts is the only avenue through which certain categories of protected speech can be expressed, then the agenda most likely cannot categorically prohibit such speech as "off-topic." *See also Jones*, 888 F.2d at 1331 ("Content-neutral time, place, and manner restrictions are permissible . . . if they allow communication through other channels.").

To clarify, the line between relevance and irrelevance to a meeting agenda does not necessarily overlap with the line between public concerns and private concerns. In *Eichenlaub*, the plaintiff alleged that the township unjustly curtained his comment during a public meeting and then retaliated against him and his family for such comment. 385 F.3d at 277. The Third Circuit upheld the district court's denial of the plaintiff's free speech claim, much for the same reasons as the courts above—the government's curtailing of the disruptive speech "served the [permissible] function of confining the discussion to the purpose of the meeting." *Id*. at 281. But more importantly, in analyzing the retaliation claim, the court noted that "private speech not of public concern is still protected" under the First Amendment in all contexts with the exception of government employees (which requires a balancing test). *Id.* at 283. Applying this to the off-topic speech regulation rules, imposing an agenda does not mean categorically banning private speech in general, because not all private speech is necessarily off-topic. Therefore, the public/private matter divide is not as informative as the relevance/irrelevance divide.

C. <u>However, even if the government has a legitimate interest in orderliness and efficiency, the application of the prohibition of off-topic speech may not be reasonable in light of this interest if the targeted speech does not cause any "actual" disruptions.</u>

While courts have recognized the government's interest in conducting orderly and efficient meetings, the Ninth Circuit has required the government to show that the targeted speech <u>actually</u> impaired the government's interests in order for the government to succeed on an as-applied challenge. In *Norse v. City of Santa Cruz* ("*Norse II*"), the plaintiff was removed from a city council meeting after he made a Nazi salute. 629 F.3d 966, 969–70 (9th Cir. 2010). The district court granted the City's motion to dismiss, and on the first appeal, the Ninth Circuit affirmed the dismissal of Norse's facial challenge but reversed the dismissal of his as-applied challenge. *Norse v. City of Santa Cruz ("Norse I")*, 118 F. App'x 177, 178–79 (9th Cir. 2004). In doing so, the Ninth Circuit construed the City's decorum rules to only apply to disruptive conduct; and because the panel could not determine from the pleadings whether the salute was disruptive or not, the case was remanded back to the district court. *Id*. On remand, the district court granted summary

judgment in favor of the defendant based on qualified immunity, and on the second appeal, the Ninth Circuit held that the grant of summary judgment was a procedural error. *Norse II*, 629 F.3d at 972. In this opinion, the Ninth Circuit rejected the argument that the city was justified in removing the plaintiff from the meeting absent any evidence that his salute was actually disruptive. *Norse II*, 629 F.3d at 976 ("Actual disruption means actual disruption."). The Ninth Circuit was unwilling to uphold the constitutionality of a prohibition of disruptive speech as applied absent evidence of actual disruption.

In conclusion, courts have generally recognized that government entities have a legitimate interest in conducting orderly and efficient meetings and relatedly, a legitimate interest in setting meeting agendas in order to do so. Thus, courts have consistently upheld prohibitions of off-topic speech during official public meetings as facially constitutional. However, the Ninth Circuit has refused to uphold the prohibitions of off-topic speech as applied, when there is no evidence that the targeted speech was actually disruptive of the meeting.

II. The legitimate interest in conducting orderly and efficient meetings do not necessarily apply on government's social media pages.

There are a few district court cases that addressed whether the government can prohibit off-topic comments on its official social media pages, and some have answered yes while others have answered no. However, none of them mention orderliness or efficiency as potential government interests in this context.

On one hand, in *Kimsey v. City of Sammamish*, the district court of the Western District of Washington held that "avoidance of distraction and dilution of public safety" is not a compelling interest under strict scrutiny.[2] No. C21-1264 MJP, 2021 WL 5447913 at *5 (W.D. Wash. 2021). There, the plaintiffs alleged that the city violated their free speech when it deleted their comments on the city's Facebook page it deemed off-topic. *Id*. at *1. In denying the city's defense, the court explained that "avoidance of distraction and dilution of public safety messages" do not constitute compelling government interests, because the court was "aware of no such authority." *Id*. at *5. Moreover, even if the court were to find the distraction and the dilution a compelling government interest, the court held that the off-topic rule was not narrowly tailored to meet that goal, because comments, no matter how off-topic or repetitive, simply "do not obscure or impede the public's ability to review the . . . information contained in the original post." *Id.*

On the other hand, two other district courts upheld the government's prohibition of off-topic speech on its social media pages, but without clearly articulating the government's purpose or interest. First, in *Davison v. Plowman*, the district court of Eastern District of Virginia found that the purpose of the county attorney's official Facebook page was—based on the defendant's policy of removing comments that were "clearly off topic"—to "invit[e] public comments only

[2] The court applied strict scrutiny because it held that the city's Facebook page is a designated public forum, not a limited public forum like town meetings. *Id.* at *3. In doing so, the court observed that the city allows comments on Facebook posts without any prior approval and that the forum is made "wide open to the public." *Id*. at *4. Moreover, the court also noted that the city does not apply its off-topic rule consistently. *Id*. ("[C]onsistency in application is the hallmark of any policy designed to preserve the non-public status of a forum."). Lastly, the court explained that the "nature of Facebook as a forum for public discourse and the enabled commenting field" strongly suggest that the city's Facebook page is a designated public forum for expressive activities. *Id*.

with respect to the posted topics."[3] 247 F. Supp. 3d 767, 776 (E.D. Va. 2017), *aff'd*, 715 F. App'x 298 (4th Cir. 2018). Thus, the court agreed with the government that the plaintiff's off-topic comments did not comport with the purpose of the forum, and held the removal of the comment was justified because it was viewpoint neutral and reasonable in light of the purpose of the forum. *Id*.

Interestingly, the *Davison* court appears to have an idiosyncratic understanding of how Facebook pages work. The court noted that the failure to effectively moderate public discussion on the county attorney's Facebook page may have had a deleterious censoring effect, because ever since the plaintiff began posting "quite often" on that page, "[m]any fewer comments appear[ed]" from other people. *Id*. at 778. The court did not discuss how off-topic comments could have deterred other comments. Instead, it took for granted that repetitive off-topic comments can have a censoring effect on other users.[4] *Id*. 778. This is contrary to the *Kimsey* court's understanding that no Facebook comments can hinder a user from seeing and interacting with the original post. 2021 WL 5447913 at *5. This difference may partly explain why the two courts' analysis are so different despite answering a materially similar question.

Second, in *Charudattan v. Darnell*, the district court for the Northern District of Florida went one step further than the *Davison* court and implied that as long as the official Facebook page is a limited public forum, the government has the authority to prohibit off-topic speech. 510 F. Supp. 3d 1101, 1112 (N.D. Fl. 2020), *aff'd*, 834 F. App'x 477 (11th Cir. 2020). Like in *Davison*, the *Charudattan* court adopted the county sheriff's own definition of his official Facebook page's purpose, namely to provide "the public with information [the county sheriff's office] believe[s] is important or newsworthy and in certain cases is necessary to release in the interest of public safety." *Id.* However, without explaining how off-topic speech hinders this purpose, the court simply stated that because this is a limited forum, "a person may be excluded from a public forum when the person is disruptive." *Id.* (citing *Jones*, 888 F.2d at 1331–32). In doing so, the court effectively altered the "reasonable in light of the purpose of the forum" requirement to a simple "reasonable" requirement." Ultimately, the court held that the county sheriff did not violate the First Amendment when he deleted the plaintiffs' off-topic comments from his official Facebook page.[5] *Id.*

In conclusion, it is unclear what the government's interests are in prohibiting off-topic speech on its social media pages based on these three cases. None of them discuss orderliness and efficiency. While they do cite to cases like *City of Norwalk* and *Steinburg*, the comparisons between official social media pages and public meetings are cursory at best. The following section

[3] This is tautological argument—if the purpose of the forum is to prohibit off-topic speech, then of course, the act of prohibiting off-topic speech is going to be reasonable in light of the purpose of the forum.

[4] While Facebook does not limit the number of comments on a given post, one could imagine a scenario in which other users were deterred from commenting because they were put off by repetitive, off-topic comments. However, the court did not discuss this causation.

[5] This court seemed particularly hostile to the plaintiffs. The court even rejected the claim that the deletion of the plaintiffs' on-topic comments violated the First Amendment, because the plaintiffs failed to establish the government's liability. *Id.* at 1113.

offers a list of ways social media pages are distinguishable from public meetings for the purposes of defining government's interest in prohibiting off-topic speech.

III. The NIH's social media pages do not have the same features as public meetings, so a court is less likely to find it has a legitimate interest in limiting off-topic speech.

Because the NIH's social media pages are practically and functionally different from physical public meetings, the government does not have the same legitimate interest in limiting off-topic speech on them. This section discusses some of those practical and functional differences. As a side note, none of the district court cases thus far have analyzed government-run social media pages in the context of the government's interest in conducting "efficient and orderly" meetings, so the following arguments are not necessarily found in any case law.

A. There are no equivalent time and space constraints on NIH's social media pages.

The NIH does not have the same interest in conducting efficient and orderly meetings, because there is no time limit as to when and who can comment on its social media pages. Unlike public meetings, there is no need for the government to "ration[] its time": Anyone can comment on any post at any time. *Cf. City of Madison*, 427 U.S. 177 (Stewart, J. concurring).

However, the NIH does have some space constraints, albeit not equivalent, on its social media pages. First, while there can, in principle, be an unlimited number of comments on a given Facebook or Instagram post, when a post is inundated with hundreds if not thousands of comments, each comment practically becomes invisible. For example, a comment can "buried" in other comments such that no one will read actually it. Second, the user interface of Facebook is such that, in my experience, the post (1) sometimes indicates a greater number of comments than you can see, and (2) cannot load more than 500 or so comments before the website starts to crash. Therefore, the space is not as "unlimited" as one might think from the perspective of the listener/reader.

If the government were to argue this interest, it would be similar to the interest the City of Sammamish asserted in *Kimsey*—excess off-topic comments can cause "distraction and dilution" of other users' comments. 2021 WL 5447913 at *5. This interest may be recognized, if the purpose of the social media accounts is for the NIH to hear from the public on a certain topic or for users to read one another's comments. However, this purpose is not articulated anywhere on the NIH's Facebook page, Instagram page, or Comment Guidelines.

B. There is no clearly defined topic of business to attend to on NIH's social media pages.

Nowhere on NIH's social media pages are there any articulations of an agenda or specific topics of discussion. In each of the cases mentioned in Section I, there was a clear agenda or business for the public body to attend to. However, here, neither NIH's Facebook or Instagram page articulates a specific agenda for the accounts. The respective bios simply read "Official Facebook account of the National Institutes of Health" and "Official Instagram account of the National Institutes of Health." Both accounts link to the "Comment policy" in their bios as well, which redirects to the NIH's official website, but even on this page, there are no mentions of any agendas or the desired topics of discussion. The individual posts likewise do not state an agenda or articulate what constitutes on or off topic speech. This lack of clearly defined set of topics—unlike a public meeting—signals that the NIH does not have a similar interest in conducting

orderly and efficient meetings: there is no agenda, because the same kind and degree of orderliness and efficiency are not necessary on social media pages.

Even if a type of an agenda could be implied from the fact that each post is about one topic—typically an article published by the NIH—this post-by-post agenda is materially different from the agendas during public official meetings. Most importantly, the post-by-post agenda is not informed by a need to conduct orderly and efficient meetings; it is simply a function of Facebook and Instagram's user interface. Moreover, if a post is equivalent to a topic, the NIH is certainly not applying its off-topic rule uniformly. Instead of assessing the relevance of each comment post by post, it is categorically prohibiting certain keywords across all posts, regardless of the content of the posts.[6]

That leaves the NIH in general as the relevant topic or agenda. However, if this were the case, then comments regarding animal testing and PETA are not off-topic and therefore should not be subject to the off-topic prohibition (whereas an ad for a hair product, for example, would be off-topic).

C. Disruption in decorum and civility do not threaten order to the same extent on NIH's social media pages.

On social media platforms, a user cannot "constantly interrupt" or "filibuster" the post through their comments, off-topic or not. *Cf. Eichenlaub*, 385 F.3d at 281 ("[F]or the presiding officer of a public meeting to allow a speaker to try to hijack the proceedings, or to filibuster them, would impinge on the First Amendment rights of other would-be participants."). First, as the *Kimsey* court noted, no comments on Facebook or Instagram can obscure the public's ability to review the content of the original post. 2021 WL 5447913 at *5. Because Facebook automatically filters to show the "most relevant" comments first, off-topic comments do not necessarily obscure other users' comments either.

Second, contrary to what the *Davison* court stated, no comments on Facebook or Instagram can prevent other users from posting comments. 247 F. Supp. 3d at 776 (explaining that the repetitive off-topic comments may have prevented others from commenting). Facebook and Instagram do not cap the number comments a post can have. Whether a user can post a comment or not is completely independent of the content of other users' comments. *Compare, e.g., City of Norwalk*, 900 F.2d at 1426 (explaining disruptive speech may "interfere with the rights of other speakers").

Indeed, no one user can "seize the podium" and threaten to disrupt a discussion on any one post, let alone the entire social media page. Realistically, off-topic comments are automatically filtered to the bottom by Facebook and even if they are not filtered, any user can simply scroll past them within a matter of seconds. Thus, the nature of Facebook and Instagram is materially different from the "nature of a [c]ouncil meeting" in which a speaker may disrupt the meeting by "extended

[6] This lack of uniformity either means (1) the Facebook page is a designated public forum, not a limited public forum, because there is no consistency in the application of its rules, *see Kimsey*, (2) the keyword blocking is not "reasonable in light of the purpose of the forum," because it is not properly filtering out so-called "off-topic" comments, or both.

discussion of irrelevancies" *Id.* at 1426. Even if there is "disruption" created by off-topic comments on Facebook or Instagram, it is minimal at best.

D. There is no back and forth between the moderator and the speaker on NIH's social media pages before the speaker is barred from being off-topic.

NIH's keyword blocking effectively functions as a prior restraint, which is a much more drastic measure than public meeting prohibition rules that function as a deterrence after-the-fact. When the threat of disorderliness and inefficiency are minimal on social media pages as discussed above, the government does not have a legitimate interest in adopting an even more stringent mode of censorship than in public meetings, where such threat is comparatively greater.

In public official meetings, the off-topic prohibition rule is applied after-the-fact as a deterrence measure. For example, in *Steinburg*, the plaintiff was first allowed to speak before he was cut off for being off-topic. 527 F.3d at 382. The plaintiff then asked why he was being cut off, to which the commissioner answered with a reminder of the topic of discussion. *Id.* The conversation between the plaintiff and the commissioners ensued for a few minutes before the plaintiff was finally escorted out of the meeting for being off-topic and disruptive. *Id.* Similarly, in *Jones*, the plaintiff was allowed to speak at the podium before the mayor advised him to "confine his comments to the topic at hand." 888 F.2d at 1329. And like in *Steinburg*, the plaintiff was removed from the meeting only after the mayor had repeatedly asked him to stay on topic. *Id*.

In comparison, the keyword blocking employed by the NIH does not allow certain off-topic comments to be posted in the first place. Complaint at para. 39, *Krasno v. Collins*, no. 21-2380 (D.D.C. Sept. 10, 2021). On Facebook, in some instances, the user's comments simply get marked "unable to post" without any explanation as to why. *Id.* at para. 62. On Instagram, the user does not get a notification that their comment has been blocked; the only way to find out is to log out of one's account and see if the comment is visible to other users after the fact. *Id.* at para. 69. In effect, the users are silenced without a reminder, warning, or explanation.

In conclusion, the NIH's Facebook pages do not have a time or space constraint and has no set agenda. Moreover, the nature of a Facebook and an Instagram page is such that off-topic comments do not threaten decorum and civility like an off-topic comment would during a public meeting. Therefore, the government does not have the same legitimate interest in conducting efficient and orderly meetings on its social media pages. The government further does not have a legitimate reason for employing prior restraint through keyword blocking, which is an even more drastic measure than the ones employed by public meeting moderators.

Applicant Details

First Name	**Conner**
Last Name	**Kozisek**
Citizenship Status	**U. S. Citizen**
Email Address	**ck3257@nyu.edu**
Address	**Address** Street **240 Mercer St #617A** City **New York** State/Territory **New York** Zip **10012** Country **United States**
Contact Phone Number	**4027602600**

Applicant Education

BA/BS From	**University of Nebraska-Lincoln**
Date of BA/BS	**May 2018**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 17, 2023**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**2022-23 ABA National Appellate Advocacy Competition** **51st Annual William B. Spong Tournament**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hershkoff, Helen
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Rosenblum, Noah
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Redwood, Britta
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

CONNER KOZISEK
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April 26, 2023

The Honorable Kiyo A. Matsumoto
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Dear Judge Matsumoto:

I am a third-year law student at New York University School of Law, and I write to convey my strong interest in a clerkship in your chambers beginning in October 2025. After graduation, I will complete a two-year Equal Justice Works public interest fellowship focused on voting rights and election administration.

Last spring, I served as a teaching assistant for Professor Noah A. Rosenblum's Constitutional Law course. Professor Rosenblum mentioned that he had served on a committee with you, and he recommended that I apply for a clerkship in your chambers.

Enclosed please find my resume, transcript, and writing sample. NYU will separately submit letters of recommendation from the following NYU Law professors:

> Noah A. Rosenblum, noah.rosenblum@nyu.edu, 212-998-6009
> Helen Hershkoff, helen.hershkoff@nyu.edu, 212-998-6285
> Britta Redwood, bmr8216@nyu.edu, 212-998-6598

I would welcome the opportunity to interview with you. Thank you for your time and consideration.

Respectfully,

/s/ Conner Kozisek

Conner Kozisek (he/him/his)

CONNER KOZISEK

240 Mercer Street #617A • New York, NY 10012 • 402-760-2600 • ck3257@nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
JD Candidate, May 2023
Unofficial GPA: 3.59
Honors: Moot Court Board (journal equivalent), 3L Competitions Team and Staff Editor
Dean's Scholarship—*partial tuition scholarship based in part upon academic merit*
Activities: Spong Constitutional Law Moot Court Tournament at William & Mary Law School, Quarterfinalist
Professor Helen Hershkoff, Research Assistant
Professor Noah A. Rosenblum, Teaching Assistant (Constitutional Law)
OUTLaw (LGBTQ+ Law Student Association), Member

UNIVERSITY OF NEBRASKA–LINCOLN, Lincoln, NE
BA in Political Science and Spanish, with Highest Distinction and University Honors, May 2018
Senior Thesis: *The Personality Traits of Protesters: Using the "Big Five" Model to Understand Protest Behavior*
Honors: Phi Beta Kappa
Outstanding Political Science Undergraduate
Outstanding Student Leadership Award Finalist

EXPERIENCE

NEW YORK LEGAL ASSISTANCE GROUP (NYLAG), New York, NY
Clinical Intern, ***Legal Clinic for Pro Se Litigants***, Fall 2022–Present
Provide direct limited scope legal assistance to federal pro se litigants in the SDNY, including drafting and reviewing complaints, motions, and other legal filings. Conduct intake interviews and provide referrals, when appropriate.

FAIR ELECTIONS CENTER, Washington, DC
Legal Intern, Summer 2022
Drafted complaint claiming denial of the right to vote and detrimental reliance in violation of the Constitution. Researched state election certification and voter challenge policies.

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, Washington, DC
Legal Intern, ***Voting Rights Project***, Spring 2022
Assisted in research for state and local redistricting litigation and voting rights cases. Wrote memoranda on a private right of action under § 2 of the Voting Rights Act and on state lawmakers invoking legislative privilege in redistricting litigation.

BRENNAN CENTER FOR JUSTICE, New York, NY
Clinical Intern, ***Democracy Program***, Fall 2021
Researched policy reforms addressing the institutional shortcomings in state and local election boards. Drafted report section on methods to ensure election uniformity throughout New York. Wrote memorandum on model legislation to bolster the personal security of election officials.

HON. TANYA S. CHUTKAN, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, Washington, DC
Judicial Intern, Summer 2021
Conducted legal research and attended hearings concerning civil and criminal matters pending before the court.

NEBRASKA UNICAMERAL LEGISLATURE, Lincoln, NE
Administrative Aide, August 2018–July 2020, ***Committee Clerk***, September 2019–July 2020
Authored correspondence, memoranda, and press releases. Created and distributed monthly newsletters and planned town hall meetings. Managed office scheduling and responded to constituent concerns by phone, mail, and email.

ADDITIONAL INFORMATION

Limited working proficiency in Spanish. Enjoy reading literary fiction, watching the Oscars, and practicing yoga.

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective Fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

Updated: 10/4/2021

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

***Pomeroy Scholar**:*	Top ten students in the class after two semesters
***Butler Scholar**:*	Top ten students in the class after four semesters
***Florence Allen Scholar**:*	Top 10% of the class after four semesters
***Robert McKay Scholar**:*	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, or to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

Name: **Conner Kozisek**
Print Date: **01/17/2023**
Student ID: **N16137257**
Institution ID: **002785**
Page: **1 of 2**

New York University
Beginning of School of Law Record

Fall 2020

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Britta M Redwood			
Criminal Law	LAW-LW 11147	4.0	A-
Instructor: Kim A Taylor-Thompson			
Torts	LAW-LW 11275	4.0	A
Instructor: Mark A Geistfeld			
Procedure	LAW-LW 11650	5.0	A-
Instructor: Troy A McKenzie			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: Caste, Class, and Race in the			
Instructor: Stephen Gillers			
Barbara Gillers			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2021

School of Law
Juris Doctor
Major: Law

Constitutional Law	LAW-LW 10598	4.0	A-
Instructor: Kenji Yoshino			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Britta M Redwood			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B+
Instructor: Emma M Kaufman			
Contracts	LAW-LW 11672	4.0	B
Instructor: Clayton P Gillette			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Stephen Gillers			
Barbara Gillers			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2021

School of Law
Juris Doctor
Major: Law

The Law of Democracy	LAW-LW 10170	4.0	B+
Instructor: Richard H Pildes			
Brennan Center Public Policy Advocacy Clinic	LAW-LW 10328	3.0	A
Instructor: Yurij Rudensky			
Brennan Center Public Policy Advocacy Clinic Seminar	LAW-LW 10353	2.0	A
Instructor: Yurij Rudensky			
Orison S. Marden Moot Court Competition	LAW-LW 11554	1.0	CR
Racial Justice and the Law	LAW-LW 12241	2.0	CR
Instructor: Bryan A Stevenson			
After the 2020 Election: the Paths and Challenges of Political Reform Seminar	LAW-LW 12398	2.0	B+
Instructor: Robert Bauer			
Research Assistant	LAW-LW 12589	1.0	CR
Summer 2021 Research Assistant			
Instructor: Helen Hershkoff			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	45.0	45.0

Spring 2022

School of Law
Juris Doctor
Major: Law

Examining Disability Rights and Centering Disability Justice	LAW-LW 10983	3.0	A-
Instructor: Natalie Michele Chin			
Evidence	LAW-LW 11607	4.0	A-
Instructor: Daniel J Capra			
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Noah Rosenblum			
Labor Law	LAW-LW 11933	4.0	A-
Instructor: Cynthia L Estlund			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	58.0	58.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Civil Rights	LAW-LW 10265	4.0	A-
Instructor: Baher A Azmy			
Law & Literature Seminar	LAW-LW 10357	2.0	A
Instructor: Daniel N Shaviro			
Property	LAW-LW 11783	4.0	B
Instructor: Cynthia L Estlund			
Civil Federal Legal Services Externship	LAW-LW 12807	3.0	A-
Instructor: Hans A Romo			
Robyn Tarnofsky			
Civil Federal Legal Services Externship Seminar	LAW-LW 12808	2.0	A-
Instructor: Hans A Romo			
Robyn Tarnofsky			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	73.0	73.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Contracts Theory Seminar	LAW-LW 10345	2.0	***
Instructor: Brittany Farr			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	***
Instructor: Joseph E Neuhaus			
Moot Court Board	LAW-LW 11553	2.0	***
Federal Courts and the Federal System	LAW-LW 11722	4.0	***
Instructor: Helen Hershkoff			
Advanced Civil Federal Legal Services Externship	LAW-LW 12809	3.0	***
Instructor: Hans A Romo			
Robyn Tarnofsky			
Advanced Civil Federal Legal Services Externship Seminar	LAW-LW 12810	2.0	***
Instructor: Hans A Romo			
Robyn Tarnofsky			

	AHRS	EHRS
Current	15.0	0.0
Cumulative	88.0	73.0

Name:	**Conner Kozisek**
Print Date:	**01/17/2023**
Student ID:	**N16137257**
Institution ID:	**002785**
Page:	**2 of 2**

Staff Editor - Moot Court 2021-2022

End of School of Law Record

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A private university in the public service

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New York, NY 10012-1099

Helen Hershkoff
Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties
Co-Director, The Arthur Garfield Hays Civil Liberties Program

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June 6, 2022

Dear Judge:

I am writing to recommend Conner Kozisek to be your judicial clerk following his graduation from New York University School of Law in May 2023. I have known Conner since his 1L summer when he worked with me as a Research Assistant. I was very happy with Conner's research and writing, and those skills, plus his professionalism, diligence, and congeniality, would in my view make him a highly superior judicial clerk.

Conner worked on two assignments. First, he was part of the research team preparing annual supplementation to Volume 14 of Wright & Miller's Federal Practice and Procedure. This volume pertains to the United States as a party, and deals with difficult and complex questions of sovereign immunity. Conner's focus was on the Tucker Act, the statutory waiver of immunity for contract and certain statutory and other disputes. Not surprisingly, at the outset of the project Conner knew nothing about the Tucker Act, the history of the Court of Claims, or the work of the Federal Circuit. But he showed himself to be a very quick learner, analytically acute, and a precise and careful reader of cases. His written work was excellent—clear, succinct, and accessible. He also displayed all of the personal qualities one would want in a Research Assistant—reliability, good cheer, enthusiasm, and energy.

I was exceptionally pleased with Conner's work and invited him to work on a second project in connection with a report I am preparing as Co-Reporter to the International Association of Comparative Law for its Congress on the contractualization of civil litigation. Conner's research focused on post-dispute discovery agreements and the circumstances in which a court will decline the parties' (or a party's) request to maintain information under seal or otherwise not available to the public. Again, Conner's work product was excellent. He required very little supervision and showed strong professional judgment in his selection and analysis of the caselaw. I have great confidence that he would show the same agility, diligence, and excellence as a judicial clerk. I add that Conner did these research projects while working full-time as a judicial intern for Judge Tanya S. Chutkan, demonstrating superior time management skills.

Conner hails from Nebraska. He wrote in an email to me (and I have permission to quote): "I was born and raised in the middle of nowhere. Literally—my hometown nestled in the sandhills of Nebraska adopted the motto 'Welcome to the Middle of Nowhere' a few years

before I was born. I think growing up in a rural farm town taught me a certain kind of work ethic that I continue to rely upon in law school." He graduated in 2018, Phi Beta Kappa with Highest Distinction and University Honors, from the University of Nebraska-Lincoln. Before enrolling at NYU Law, he worked for two years in Nebraska's Unicameral Legislature, first as an administrative aide to a State Senator and then as a Committee Clerk to the Urban Affairs Committee. Conner tells me that the work was fast paced and constantly introduced him to new policy issues that he was pushed quickly to learn, summarize, and then share with state senators, community leaders, and constituents. As a committee clerk, he assisted with conducting a broad range of research comparing municipal policies throughout the state and tracking relevant legislation in other states. With the onset of the COVID-19 pandemic, his responsibilities shifted, and he worked extensively with constituents, especially those who had lost their jobs and been denied unemployment insurance benefits. Conner described the work as stressful and time-sensitive, but I think many of Conner's personal qualities made him exceptionally adept in this job. He is calm, patient, focused, and respectful, and highly skilled at navigating and explaining complex rules.

Conner entered the Law School as a Dean's Scholar (a scholarship reserved for a very select group of admitted students), and has been actively involved with the Moot Court Board Competition (during the competition he ranked fifth out of seventy NYU Law students, and was invited to participate in an interschool competition, where he and his partner made it through three preliminary rounds and finished in the quarter final). He also has actively sought out internships to gain experience with litigation, legislation, and policy advocacy. In this capacity he has interned at the Voting Rights Project at the Lawyers' Committee for Civil Rights Under Law and at the Brennan Center for Justice's Public Policy Advocacy Clinic. He also has served as a Teaching Assistant and is truly engaged with and curious about the law.

In my view, Conner would be a superior judicial clerk. He is whip smart, has excellent writing skills, displays consistent professional maturity, and is reliable and hard working. He may say he comes from "nowhere" but I have no doubt he is headed somewhere great as a lawyer.

Thank you for your consideration. If you have any questions or would like additional information, please do not hesitate to contact me.

Sincerely,

Helen Hershkoff

NYU | LAW

Noah A. Rosenblum
Assistant Professor of Law
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E: noah.rosenblum@nyu.edu

In Re: Conner Kozisek Clerkship Application

Dear Judge,

I write in support of Conner Kozisek's application for a judicial clerkship in your chambers. Conner has tremendous legal acumen, top-notch research and writing abilities, and a deep devotion to justice. Based on my familiarity with his work and my personal knowledge of him, I believe he will make a fantastic law clerk.

I have come to know Conner as one the teaching assistants for my Constitutional Law course. The class enrolls roughly ninety students and is supported by four teaching assistants. As at other law schools, teaching assistantships at NYU Law are highly sought after and obtaining one is competitive.

Conner's reputation preceded him. I unexpectedly had need for an additional teaching assistant and, not having taught the course before, had no previous students of my own to ask. One of my already-hired assistants suggested Conner, noting his excellent academic record. I interviewed him, along with several other candidates, and was immediately struck by Conner's winning combination of intellectual sophistication, generosity, and humility. I offered him the position right away.

It was a lucky decision on my part. I soon had the opportunity to see Conner's prodigious talent for myself. As my teaching assistant, Conner works as part of a team to take and post class notes, prepare bi-weekly practice problems and model answers, and lead regular review sessions on course material. I have thus been able to observe Conner's work both individually and as part of a group.

In both capacities, Conner has excelled. His notes, practice problems, and model answers have been consistently excellent. He is able to listen to my messy and confused lectures and distill the key legal concepts in real time, re-presenting them in a clear, logical, and ordered way for the enrolled students. Conner's draft practice problems have cut to the heart of the legal questions we study. And his model answers have regularly addressed the doctrines we have learned with care and understanding, requiring only minor review on my part. He is, in short, an excellent legal writer and thinker.

Conner's strong legal research and writing skills are also evident from a writing sample of his that I reviewed, his moot court brief. In my opinion, it is first-rate: crisp, persuasive, smart, and deeply researched. I was especially struck by the clarity and grace of Conner's writing. He builds his argument through a logical progression of interlocking paragraphs, headed by well-

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crafted topic sentences, distilling and applying legal rules along the way. This is the kind of necessary, unflashy legal writing that I see in the best advocates, but rarely in a student.

I can attest that Conner deploys these same tremendous abilities effectively in oral communication. He leads review sessions with clarity and fields student questions responsively, with precision and directness. A member of the Moot Court board (and a high-scoring competitor, placing fifth in a field of seventy in NYU's intra-school competition, and finishing in the quarterfinals at an inter-school invitational at William & Mary), Conner brings the same poise and flexibility he deploys in the courtroom to all his on-his-feet interactions.

Conner has also thrived as a member of a team. While he clearly takes pride in his own written work, he is not possessive: I have seen him revise his colleagues' writings and slides as if they were his own and accept revisions from them and me in the same spirit. He gets along well with his co-instructors. And he has helped me apportion and manage the teaching team's work. This selfless collaboration has made working with Conner an easy pleasure.

Conner's success at NYU Law is particularly noteworthy given his background. Our campus is located downtown, in the heart of a bustling city. Conner, however, comes from a small town in the sandhills of Nebraska. (The town motto is, in fact, "Welcome to the middle of nowhere.") At a school full of rich city kids with ivy league educations, Conner is the unusual student from a rural farm town and a proud state university. As far as I can tell, that background has only made Conner more thoughtful, dedicated, understanding, and resilient.

Conner hopes to pursue a career in civil rights advocacy with a focus on voting rights, building on his work with the Brennan Center, the Lawyers' Committee for Civil Rights, and the Fair Elections Center. As he has been counseled, a clerkship would likely help him achieve his professional ambitions. While I believe this is correct, I encouraged Conner to apply for a clerkship because of what I believe he has to contribute to the judge who will hire him. As a former judicial clerk myself, I well remember the crucial role clerks play in chambers and the need judges have for legal talent. Conner has the intellect, ability, and application to make a meaningful contribution from his first day. And he has the ideal temperament for a chambers colleague—conscientious, empathetic, and with a deeply ingrained work ethic.

Conner is quite simply talented and lovely. If you have any questions or concerns, or require any additional information, please do not hesitate to reach out.

Sincerely,

Noah A. Rosenblum
Assistant Professor of Law
NYU School of Law

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June 13, 2022

RE: Conner Kozisek, NYU Law '23

Your Honor:

I am delighted to recommend Conner Kozisek, a rising third-year student at New York University School of Law, for a clerkship in your chambers.

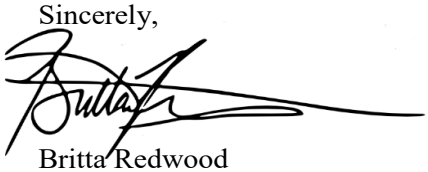
Conner was a student in my Lawyering class, a year-long course that teaches traditional legal skills including legal writing, research, and oral presentations and argument. The course also focuses on skills such as interviewing, counseling and communicating with clients and invites students to reflect on ethical and professional challenges through simulations. The Lawyering class is the smallest class that first-year law school students have; usually around thirty students are enrolled. Over the course of year, students complete research and writing assignments independently, but they work in small groups to represent fictional clients and critique one another's work. In this context, have had occasion not only to read Conner's writing and observe him in the classroom, but I have also been able to see he interacts with other students and what kind of team member he is.

Conner's performance in my class was excellent. His written work has been consistently strong. He writes skillfully and clearly, and did so from the very beginning of the course. He organized his written work logically and effectively and was able to quickly grapple with and effectively summarize relevant case law. He also showed diligence in his research—often finding and highlighting nuances that others missed. I mention each of these elements individually because, in my experience, students tend to struggle with one or several of them. Conner did not.

On a more personal note, Conner was a delight to have in class. His frequent contributions to our class discussions always demonstrated thoughtfulness and empathy. I know Conner to be a professional, genuine, and friendly person. Based on the manner in which he has interacted with me and others, I believe that he will also be an emotionally-intelligent, hardworking, and generous colleague and a competent law clerk.

For these reasons, I have no doubt that Conner would be an asset in your chambers and will continue to make important contributions as a member of the legal community in the years to follow. I recommend him strongly, and I hope you will not hesitate to let me know if I can be of any further assistance in your deliberations.

Sincerely,



Britta Redwood

WRITING SAMPLE

Conner Kozisek
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The attached writing sample is an excerpt from a brief submitted to the intra-school New York University School of Law Orion S. Marden Moot Court Competition. The case involved a man named Dougie McFay who had planned an armed robbery of Fenway Park. On the evening of the intended robbery, he visited a coffee shop near the Park but, upon seeing a heightened police presence in the area, terminated his plan and returned home. He was subsequently arrested and convicted in federal court for an attempted Hobbs Act robbery and for use of a firearm in furtherance of a crime of violence. Competitors addressed the following two issues:

1. Whether the district court erred in concluding that McFay had taken a substantial step toward the completion of a Hobbs Act robbery.

2. Whether the district court improperly categorized attempted Hobbs Act robbery as a crime of violence under 18 U.S.C. § 924(c).

I represented the defendant-appellant, Dougie McFay, and wrote a brief in support of his appeal before the fictional U.S. Court of Appeals for the Fourteenth Circuit. Please note the brief is entirely my own work product and has not been edited or reviewed by any other person.

STATEMENT OF FACTS

In early April 2020, Appellant Dougie McFay ("Appellant" or "McFay") and his Co-Defendant Jimmy Loughlin ("Loughlin") began planning a robbery of a Red Sox game at Fenway Park—a robbery that never happened. (R. at 4.) On the evening of the planned robbery, the two left McFay's home, stopped at a Moonbucks coffee shop before the game was set to begin, and then terminated their plan and retuned to McFay's home. (R. at 5.)

From the outset, McFay was reluctant to rob Fenway Park because the extensive ballpark security could lead to violence. (R. at 4.) McFay only agreed to the plan after Loughlin promised that they would only need to threaten the use of force—without actually using any physical force—during the robbery. (R. at 4.) As their plans further developed, McFay and Loughlin remained intent on not hurting anyone or using force. (R. at 5.) The pair eventually decided to rob an evening Red Sox game so they could use the cover of darkness when fleeing the scene to further minimize any chances of having to use physical force. (R. at 5.)

On June 24, 2020, McFay and Loughlin dressed in faux police officer uniforms and armed themselves. (R. at 5.) Before the pair left McFay's home to head toward Fenway Park, however, they decided to get coffee. (R. at 5.) At 6:00 p.m., before the baseball game had even started, the two arrived at the parking lot of a Moonbucks coffee shop located five blocks away from Fenway Park. (R. at 5.) Noticing heightened police presence in the area, the pair decided to terminate their plan and go back to McFay's home. (R. at 5.)

The following day, on June 25, 2020, McFay was arrested at his home. (R. at 5–6.) McFay had no prior juvenile adjudications or adult criminal convictions. (R. at 6.) McFay was charged with one count of conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951, one count of attempted Hobbs Act robbery in violation of 18 U.S.C. § 1951, and one

count of use of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c). (R. at 2.)

On September 17, 2020, McFay pleaded guilty to the first count of conspiracy to commit a Hobbs Act robbery before the Honorable Judge Phil Nockoff on the United States District Court for the District of Charleston. (R. at 4, 21.) McFay objected to the other two counts, arguing that his conduct did not constitute an attempted Hobbs Act robbery and that attempted Hobbs Act robbery is not a crime of violence under § 924(c). (R. at 8–12.)

At McFay's sentencing hearing on December 3, 2020, the district court rejected McFay's objections, found him guilty of all three counts, and sentenced him to 30 years in prison for his first criminal conviction. (R. at 20, 21–22.) On January 2, 2021, McFay appealed to challenge the validity of the district court's sentencing, and this Court has requested briefing on whether McFay's conduct constitutes attempted Hobbs Act robbery under § 1951 and whether attempted Hobbs Act robbery constitutes a crime of violence under § 924(c). (R. at 25, 26.)

SUMMARY OF THE ARGUMENT

The United States District Court for the District of Charleston erred in convicting McFay of one count of attempted Hobbs Act robbery in violation of 18 U.S.C. § 1951 and one count of use of a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c). This Court should reverse the district court's judgment on both counts.

First, there was insufficient evidence to support McFay's attempted Hobbs Act robbery conviction under 18 U.S.C. § 1951. Despite intending to commit the robbery and taking several preparatory steps, McFay never took a substantial step toward the robbery's completion and the record does not reflect beyond a reasonable doubt that his conduct would have resulted in a robbery. Before leaving his home, McFay and Loughlin decided to get coffee and went to a Moonbucks coffee shop. The pair then voluntarily terminated their robbery plan while still in the

coffee shop's parking lot, five blocks away from Fenway Park and before the baseball game had even started.

This Court should adopt an interpretation that encourages the abandonment of criminal plans by holding that McFay's conduct does not constitute a substantial step toward completion of attempted Hobbs Act robbery. If the Court concludes that preparatory behavior like McFay's constitutes taking a substantial step toward the completion of a robbery, there would be serious, negative policy implications. The substantial step requirement is meant to incentivize an individual to change their mind before committing a criminal act. Otherwise, individuals would feel compelled to follow through on a plan if they already believed themselves to be criminally liable for simply intending to commit a crime. McFay's conduct lacks the substantial step needed to convict him of attempted Hobbs Act robbery.

Second, this Court should hold that attempted Hobbs Act robbery is not a crime of violence under 18 U.S.C. § 924(c). The district court improperly concluded that attempted Hobbs Act robbery is a crime of violence under 18 U.S.C. § 924(c), triggering an enhanced criminal sentence for McFay. Traditionally courts have held that if a crime itself is a crime of violence, then any conspiracy or attempt to commit such a crime is necessarily a crime of violence as well. Following the Supreme Court's recent decision in United States v. Davis, 139 S. Ct. 2319, 2336 (2019), which held that a conspiracy to commit a violent crime is not a crime of violence under § 924(c), the traditional approach used by many courts should also be inappropriate for attempt liability.

By using the traditional approach to defining a crime of violence, the district court inappropriately focused on the elements of a Hobbs Act robbery instead of the elements of an *attempted* Hobbs Act robbery—the crime for which McFay was charged. Neither of attempted Hobbs Act robbery's two elements—having culpable intent to commit the robbery and taking a

substantial step toward the completion of that robbery—requires the use, attempted use, or threatened use of force. Intent is merely a mental state and, thus, requires no act at all. Even assuming, arguendo, that McFay took a substantial step, that step could be nonviolent and would not require the use, attempted use, or threatened use of force. His substantial step could be an *attempt to threaten* to use force, which would fall outside of the statutory definition of § 924(c). Therefore, this Court should hold that an attempted Hobbs Act robbery is not a crime of violence and vacate McFay's enhanced sentence.

ARGUMENT

This is a case of first impression before the United States Court of Appeals for the Fourteenth Circuit, and both issues are reviewed de novo. See, e.g., United States v. Sullivan, 522 F.3d 967, 974 (9th Cir. 2008) (explaining that whether conduct constitutes attempted Hobbs Act robbery is a claim of insufficient evidence that is reviewed de novo); United States v. Begay, 934 F.3d 1033, 1037 (9th Cir. 2019) (stating that whether attempted Hobbs Act robbery is a crime of violence under 18 U.S.C. § 924(c) is a pure question of law that is reviewed de novo).

I. APPELLANT'S CONDUCT DOES NOT CONSTITUTE ATTEMPTED HOBBS ACT ROBBERY BECAUSE APPELLANT DID NOT TAKE A SUBSTANTIAL STEP TOWARD THE COMPLETION OF A ROBBERY.

This Court should reverse the district court's decision and rule that McFay's conduct did not constitute attempted Hobbs Act robbery.

A. Attempted Hobbs Act Robbery Requires Intent to Commit the Robbery and Taking a Substantial Step Toward the Completion of the Robbery.

There was insufficient evidence to support McFay's attempted Hobbs Act robbery conviction because McFay's conduct did not constitute a substantial step toward the completion of a robbery. The federal Hobbs Act, 18 U.S.C. § 1951, criminalizes robberies affecting interstate commerce for anyone who "obstructs, delays, or affects commerce or the movement of

any article or commodity in commerce, by robbery . . . or attempts or conspires so to do . . . ." 18 U.S.C. § 1951(a). The Act defines "robbery" as "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property . . . ." Id. § 1951(b)(1).

To obtain a conviction for attempted Hobbs Act robbery, the government must prove beyond a reasonable doubt that McFay (1) had "culpable intent to commit the crime" and (2) "took a substantial step towards completion of the crime that strongly corroborates that intent." United States v. Engle, 676 F.3d 405, 419–20 (4th Cir. 2012) (citing United States v. Neal, 78 F.3d 901, 906 (4th Cir. 1996)). In other words, simply intending to commit a federal crime "is not punishable as an attempt unless [that intent] is also accompanied by significant conduct." United States v. Resendiz-Ponce, 549 U.S. 102, 107 (2007).

B. Appellant Did Not Take a Substantial Step Toward the Completion of a Hobbs Act Robbery.

Despite intending to commit the robbery and taking several steps in preparation, McFay never took a substantial step toward the robbery's completion. A substantial step "consists of conduct that is strongly corroborative of the firmness of a defendant's criminal intent." United States v. Buffington, 815 F.2d 1292, 1301 (9th Cir. 1987). On its own, McFay's preparation to commit a robbery does not constitute a substantial step. See Hernandez-Cruz v. Holder, 651 F.3d 1094, 1102 (9th Cir. 2011) ("'Mere preparation' to commit a crime 'does not constitute a substantial step.'" (quoting Buffington, 815 F.2d at 1301)).

In order to determine whether McFay's conduct constitutes a substantial step, his "actions must cross the line between preparation and attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances." United States v.

Goetzke, 494 F.3d 1231, 1237 (9th Cir. 2007) (per curiam) (quoting United States v. Nelson, 66 F.3d 1036, 1042 (9th Cir. 1995) (internal quotation marks omitted)). Further, even if he "unquestionably" had a criminal intent, "it is not enough to say that the suspect took certain necessary steps" in his preparations. Hernandez-Cruz v. Holder, 651 F.3d 1094, 1102 (9th Cir. 2011); see also United States v. Manley, 632 F.2d 978, 987–88 (2d Cir. 1980) ("[F]or behavior to be punishable as an attempt, . . . it must be necessary to the consummation of the crime *and* be of such a nature that a reasonable observer . . . could conclude beyond a reasonable doubt that it was undertaken in accordance with a design to violate the statute." (emphasis added)). McFay's conduct of visiting a Moonbucks coffee shop parking lot while dressed in a faux police officer uniform was neither necessary to the consummation of a Hobbs Act robbery nor of such a nature that one could conclude beyond a reasonable doubt that he would have committed the robbery.

McFay never made any movement toward Fenway Park itself, which supports the conclusion that his conduct did not cross the threshold separating preparation from taking a substantial step. In United States v. Still, 850 F.2d 607, 609–10 (9th Cir. 1988), the Ninth Circuit found a defendant whose preparation far exceeded McFay's own conduct had not taken a substantial step toward the completion of a bank robbery. In Still, the defendant was wearing a disguise—a long blond wig—and sitting in his van, with the motor running, within 200 feet of the bank he intended to rob. Id. The court noted that there was no substantial step because it could not be proven that the defendant had made any actual movement toward the bank or something "analytically similar" to particularized movement that would indicate a substantial step. Id. at 610. Similarly, in United States v. Harper, 33 F.3d 1143, 1147 (9th Cir. 1994), a defendant had prepared an elaborate "bill trap" by leaving cash in an ATM that would require assistance from service personnel who could then be robbed. The court noted the "bill trap," which focused on the appearance of potential victims, was different from actually moving toward

a victim or a bank to accomplish an intended robbery, which would constitute a substantial step. Id. Likewise, in Buffington, 815 F.2d at 1302–03, the court did not identify a substantial step for armed defendants who had "cased" a bank for a robbery but never entered or moved toward the bank.

Here, although McFay was also wearing a disguise, he never made any movement toward or any other action "analytically similar" to moving toward Fenway Park. (R. at 5.) His conduct does not "unequivocally demonstrate[e] that the crime will take place unless interrupted by independent circumstances." Goetzke, 494 F.3d at 1237. Before leaving his home, McFay decided to get coffee and went to a Moonbucks coffee shop. (R. at 5.) Although location is not dispositive, McFay never came within five blocks of Fenway Park (R. at 5), which is significantly farther than the defendant in Still who came within 200 feet of the bank he intended to rob. There is no evidence that McFay moved in Fenway Park's direction to commit the robbery. McFay and Loughlin also intended to rob an evening game so they could use the cover of darkness when fleeing the scene to minimize any chances of having to use any physical force. (R. at 5.) Visiting a Moonbucks coffee shop at 6:00 p.m. in the middle of summer was well before sunset and the cover of darkness intended by the plan. Any number of events could have caused McFay to terminate his plan before the intended robbery several hours later.

McFay's conduct also falls short of cases where courts have identified substantial steps toward the commission of a crime. For example, in United States v. Korich, 1994 WL 52745, *3 (7th Cir. Feb. 22, 1994), the court affirmed the district court's conviction of attempted bank robbery in part because the defendant "made actual movements toward the bank and entered the bank," while McFay had not made any movement toward Fenway Park or entered Fenway Park. McFay's conduct is also distinguishable from the more recent case of United States v. Dominguez, 954 F.3d 1251, 1258 (9th Cir. 2020). In Dominguez, the defendant was not only

armed and dressed in dark clothing, but also was driving *toward* the target he intended to rob before calling off the plan after noticing a staged police crime scene. Consistent with the previous cases, the defendants were moving toward the intended target—lending support to a finding beyond a reasonable doubt that their conduct would have resulted in a robbery. Here, the evidence is insufficient to show that McFay's conduct would have resulted in a robbery.

McFay should not be charged with attempted Hobbs Act robbery because visiting a coffee shop as far as five blocks from an intended target and hours before the plan was to take place is not taking a substantial step toward the robbery of that target. Too much uncertainty remains between this action and the time and place of the planned robbery. It is undisputed that, despite having both the opportunity and ability to rob Fenway Park on the evening of June 25, 2020, McFay terminated that plan in the parking lot of a Moonbucks coffee shop before he ever headed toward Fenway Park. (R. at 5.) McFay had already expressed his unwillingness to use force and, upon seeing heightened police presence, terminated his plan. (R. at 4–5.)

Concluding that preparatory behavior like McFay's constitutes taking a substantial step toward the completion of a robbery has serious, negative policy implications. The substantial step requirement is meant to incentivize potential criminals to change their mind before committing a criminal act. See Hernandez-Cruz v. Holder, 651 F.3d 1094, 1103 (9th Cir. 2011) ("[I]f merely preparatory behavior is held to be a substantial step supporting a conviction for attempt, the would-be criminal has far less incentive to change his mind at the last minute, and so might be more likely to carry through with his plan."). McFay's conduct was clearly preparatory and lacks the substantial step needed to convict him of attempted Hobbs Act robbery. This Court should reverse the district court's judgment.

II. ATTEMPTED HOBBS ACT ROBBERY IS NOT A CRIME OF VIOLENCE BECAUSE NEITHER ELEMENT OF ATTEMPTED HOBBS ACT ROBBERY REQUIRES THE USE, ATTEMPTED USE, OR THREATENED USE OF FORCE.

The district court further erred in concluding that attempted Hobbs Act robbery is a crime of violence as defined under 18 U.S.C. § 924(c), and McFay's enhanced sentence should be vacated. Section 924(c) requires that "any person who, during and in relation to any crime of violence . . . carries a firearm . . . shall . . . be sentenced to a term of imprisonment of not less than 5 years." 18 U.S.C. § 924(c)(1)(A)(i). Under § 924(c), a crime of violence "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A).

Traditionally courts have held that if a crime itself is a crime of violence, then any conspiracy or attempt to commit such a crime is necessarily a crime of violence as well. See, e.g., United States v. Ingram, 947 F.3d 1021, 1026 (7th Cir. 2020) (stating that if a substantive offense is a crime of violence, an attempt to commit that offense is also a crime of violence); United States v. Dominguez, 954 F.3d 1251, 1255 (9th Cir. 2020) (same); United States v. Smith, 957 F.3d 590, 596 (5th Cir. 2020) (same). However, this approach is in direct conflict with Supreme Court precedent. The Supreme Court recently held that a conspiracy to commit a violent crime is not a crime of violence that falls within the definition of § 924(c)(3)(A) because it does not require the use, attempted use, or threatened use of force. United States v. Davis, 139 S. Ct. 2319, 2336 (2019). In light of the Davis decision, the traditional approach for categorizing crimes of violence used by many courts is also inappropriate for attempt liability.

A. The Traditional Categorical Approach to Defining a Crime of Violence Is Inappropriate Because It Focuses on the Elements of Hobbs Act Robbery, Not the Elements of Attempted Hobbs Act Robbery.

By using the traditional approach to defining a crime of violence, the district court inappropriately focused on the elements of a Hobbs Act robbery instead of the elements of an

attempted Hobbs Act robbery—the crime for which McFay was charged. Other federal circuit courts have made the same error in concluding that attempted Hobbs Act robbery is a crime of violence by focusing on the underlying act of Hobbs Act robbery as a crime of violence. See, e.g., Dominguez, 954 F.3d at 1255 (stating that because "Hobbs Act robbery is a crime of violence, it follows that the attempt to commit Hobbs Act robbery is a crime of violence" but not focusing on the elements of attempted Hobbs Act robbery); United States v. St. Hubert, 909 F.3d 335, 351–52 (11th Cir. 2018) (holding that attempted Hobbs Act robbery categorically qualifies as a crime of violence under the elements clause of § 924).

As previously discussed, a conviction of attempted Hobbs Act robbery requires two elements: (1) the defendant had culpable intent to commit the crime and (2) the defendant took a substantial step toward the completion of that crime. Neither intending to commit a Hobbs Act robbery nor taking a substantial step toward the completion of that robbery requires the use, attempted use, or threatened use of force. It is logically flawed to conclude that by being convicted of an attempt to commit a crime that involves the threatened use of force, for example, one must also have been found beyond a reasonable doubt to have attempted to use force. Even if an underlying crime is a crime of violence, such as a Hobbs Act robbery, the crime may be committed "without the use or attempted use of physical force because [it] may be committed merely by means of threats." United States v. Taylor, 979 F.3d 203, 208 (4th Cir. 2020), cert. granted, 2021 WL 2742792 (U.S. July 2, 2021); see also United States v. Mathis, 932 F.3d 242, 266 (4th Cir. 2019) (holding that "Hobbs Act robbery, when committed by means of causing fear of injury, qualifies as a crime of violence").

An attempt to commit a crime of violence does not necessarily involve the attempted use of physical force. *Attempting* to use physical force falls under § 924(c). *Threatening* to use

physical force falls under § 924(c). Yet, *attempting to threaten* to use physical force is distinct and does not fall under § 924(c). Taylor, 979 F.3d at 208.

B. Intent Is Merely a Mental State that Does Not Require the Use, Attempted Use, or Threatened Use of Force.

Intent is merely a mental state. Thus, it requires no act at all. In other words, intending to commit a crime is distinct from attempting to commit the crime. United States v. St. Hubert, 918 F.3d 1174, 1212 (11th Cir. 2019) (Pryor, J., dissenting from denial of rehearing en banc) ("Intending to commit each element of a crime involving the use of force simply is not the same as *attempting* to commit each element of that crime."). Even if McFay intended to commit a robbery, that intent does not involve the use, attempted use, or threatened use of force required of a crime of violence under § 924(c).

C. Taking a Substantial Step Does Not Require the Use, Attempted Use, or Threatened Use of Force.

Even assuming, arguendo, that McFay took a substantial step toward the completion of a Hobbs Act robbery, that step could be nonviolent and would not require the use, attempted use, or threatened use of force. See Taylor, 979 F.3d at 208 (noting a defendant who "takes a nonviolent substantial step toward threatening to use physical force . . . has not used, attempted to use, or threatened to use physical force."). Attempting to threaten to use force is not the same as attempting to use force. See, e.g., id. ("[T]he defendant has merely *attempted to threaten* to use physical force. The plain text of § 924(c)(3)(A) does not cover such conduct."); but cf. United States v. McCoy, 995 F.3d 32, 55 (2d Cir. 2021) (holding that the crime of attempting to commit a Hobbs Act robbery *using force* is a crime of violence under 18 U.S.C. § 924(c) (emphasis added). Although the court in McCoy acknowledged that an attempt to threaten was "theoretically . . . possible," it concluded that there was not a "realistic probability" that this situation would arise. Id. at 56. Here, however, McFay clearly intended to not use any force and

only threaten the use of physical force. (R. at 4.) Thus, assuming an attempt occurred, it would be an *attempt to threaten* force, showing that attempting to threaten is not only a "realistic probability" but has actually occurred in the present case. McFay could have committed attempted Hobbs Act robbery by attempting to threaten to use force, which does not mean he used, attempted to use, or threatened to use force, thereby falling outside the definition of § 924(c). Therefore, an attempted Hobbs Act robbery is not a crime of violence under § 924(c).

Neither wearing a police officer costume nor going to a Moonbucks coffee shop is a violent act. McFay was clear with his intent to only threaten the use of force. (R. at 4–5.) Thus, if he had completed a substantial step toward an attempt, it was only an attempt to threaten the use of force, which is a nonviolent act and not in violation of § 924(c)(3)(A). See Taylor, 979 F.3d at 208 (noting that the "plain text" of § 924(c)(3)(A) does not include an "attempt[] to threaten to use physical force . . . ." (emphasis omitted)). This Court should reject the district court's determination and hold that an attempted Hobbs Act robbery is not a crime of violence under § 924(c).

CONCLUSION

For the foregoing reasons, this Court should find that McFay's conduct did not constitute attempted Hobbs Act robbery and that attempted Hobbs Act robbery is not a crime of violence under 18 U.S.C. § 924(c). The Court should reverse the judgment of the United States District Court for the District of Charleston for both counts and vacate McFay's enhanced sentencing under § 924(c).

Applicant Details

First Name	**Dhruv**
Last Name	**Kumar**
Citizenship Status	**U. S. Citizen**
Email Address	**dk2944@nyu.edu**
Address	**Address** **Street** **491 9th Street, APT 3F** **City** **Brooklyn** **State/Territory** **New York** **Zip** **11215** **Country** **United States**
Contact Phone Number	**4089218990**

Applicant Education

BA/BS From	**Cornell University**
Date of BA/BS	**December 2018**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 30, 2023**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Bankruptcy, Prison Litigation**

Recommenders

Gottlieb, Christine
gottlieb@mercury.law.nyu.edu
212-998-6693

Andrews, Courtney
courtney.andrews@whitecase.com
213-620-7721

Will, Lori
lori.will@delaware.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 05, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am a 2023 graduate of the New York University School of Law, and I am applying for a clerkship in your chambers for the 2025 – 2026 term or any subsequent term.

Central to my clerkship aspirations is my passion for litigation, including both oral and written advocacy. Beginning with collegiate mock trial, I was able to develop my skills in procedure and evidence in law school through clinical experience and by competing for the Trial Advocacy Society. I also practiced my litigation research and writing skills over two summers at White & Case. Although my professional background from before law school is primarily in financial services, I hope to use my litigation background in the future for public service, especially around criminal justice reform.

Enclosed is my resumé, law school transcript, undergraduate transcript, writing sample, and three letters of recommendation. My writing sample was prepared for an antitrust trial at White & Case. It is a motion *in limine* for the plaintiff, to preclude the defendant from introducing evidence about a separate, earlier litigation.

I am submitting three letters of recommendation, written by Vice Chancellor Lori W. Will, Professor Christine Gottlieb, and Courtney H. Andrews. The Honorable Lori W. Will is a Vice Chancellor of the Delaware Court of Chancery, and she was my professor at NYU Law for a seminar and simulation on corporate and transactional litigation that focused on Delaware corporate law. In addition to engaging in classroom discussion, as part of the simulation I submitted two written briefs to the Vice Chancellor —one at the trial level and one appellate—and performed one oral argument. The Vice Chancellor can be reached at lori.will@delaware.gov. Professor Gottlieb is a Research Scholar and Adjunct Professor of Clinical Law at NYU, and we worked closely together over two semesters as part of the Family Defense Clinic and its accompanying seminar. She supervised multiple appearances in Kings County Family Court where I spoke on the record, and we worked together on an appellate brief. Professor Gottlieb can be reached at gottlieb@exchange.law.nyu.edu or (212) 998-6693. Courtney Andrews is the Hiring Partner for the Los Angeles office of White & Case, LLP, which is where I worked during both of my law school summers and will be returning full-time this fall. She is also a partner in the Firm's Global White Collar Practice. I completed many assignments reporting directly to her over both summers, and she received feedback on my proficiency from every full-time lawyer I worked with during both summers. She can be reached at courtney.andrews@whitecase.com and (213) 620-7721.

I would be honored to clerk in your chambers, and I look forward to hearing back.

Respectfully,
/s/
Dhruv Kumar

DHRUV KUMAR

491 9th Street, Apt #3F, Brooklyn, NY 11215
(408) 921-8990 • dhruv.kumar@law.nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
JD, May 2023
Activities: Trial Advocacy Society (Mock Trial), Competitor Attorney / Team Captain
South Asian Law Students Association, Member
Family Defense Clinic, Student Advocate (Fall 2021 – Spring 2022)

CORNELL UNIVERSITY, Ithaca, NY
B.A. in Government, December 2018 (accelerated)
Cumulative GPA: 3.85
Honors: Distinction in All Subjects
Dean's List (5/7 Semesters)
Activities: Mock Trial Association, Captain, Closing Attorney & Public Relations Chair
Cornell Consulting, Lead Business Analyst
The Roosevelt Institute at Cornell University, Senior Policy Chair

EXPERIENCE

WHITE & CASE LLP, Los Angeles, CA
Associate**,** Starting October 2023; ***Summer Associate***, Summer 2022; ***1L Summer Associate (Diversity Fellow)*****,** Summer 2021
Drafted a motion *in limine* for an antitrust trial, a motion to compel discovery responses, a brief supporting a civil RICO claim, a brief for GDPR litigation in Central Europe, and affidavits for incarcerated clients (*pro bono*). Researched and wrote memorandums for litigation about Delaware corporate law, federal bankruptcy law, evidentiary issues, and criminal sentencing appeals (*pro bono*). Attended internal and LCLD diversity conferences. Participated in a secondment with Facebook's in-house litigation team for the last two weeks of the 2021 program.

BROOKLYN DEFENDER SERVICES, New York, NY
Family Defense Intern (NYU Law Family Defense Clinic), September 2021 – May 2022
Represented indigent parents in Kings County (Brooklyn) Court. Developed case strategy and prepared clients for a dispositional hearing, a fact-finding hearing, and permanency hearings. Wrote and delivered direct and cross examinations and a closing argument over ten appearances. Argued evidentiary objections at each appearance. Conducted research for and contributed to an appellate stay application and an affirmation to deny expert witness certification. Strategically negotiated with opposing counsel.

OLIVER WYMAN, New York, NY
Consultant, July 2019 – May 2020; ***Summer Consultant,*** Summer 2018
Consulted on a range of projects including M&A due-diligence and liquidity risk management at a large bulge-bracket investment bank. Built complex models in Microsoft Excel, R and Python, wrote documentation, built slides, and presented to clients and high-level executives for progress updates and handover sessions.

ADDITIONAL INFORMATION

Interviewed NY state judicial candidates in 2023 as a volunteer for the Central Brooklyn Independent Democrats. Fluent in Hindi / Urdu, with basic knowledge of French and German. Enjoy surfing, hockey, and screenwriting.

Name: **Dhruv Kumar**
Print Date: **06/01/2023**
Student ID: **N14990533**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2020

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Elizabeth J Chen			
Torts	LAW-LW 11275	4.0	B
Instructor: Eleanor M Fox			
Procedure	LAW-LW 11650	5.0	A
Instructor: Helen Hershkoff			
Contracts	LAW-LW 11672	4.0	B+
Instructor: Kevin E Davis			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: Class, Gender, Politics, and			
Instructor: Stephen Holmes, David M Golove			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2021

School of Law
Juris Doctor
Major: Law

Constitutional Law	LAW-LW 10598	4.0	B
Instructor: Trevor W Morrison			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Elizabeth J Chen			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B+
Instructor: Adam B Cox			
Criminal Law	LAW-LW 11147	4.0	B
Instructor: Avani Mehta Sood			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Stephen Holmes, David M Golove			

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2021

School of Law
Juris Doctor
Major: Law

Family Defense Clinic Seminar	LAW-LW 10251	4.0	B+
Instructor: Christine E Gottlieb, Martin Guggenheim			
Basic Bankruptcy	LAW-LW 11460	4.0	B+
Instructor: Arthur Joseph Gonzalez			
Family Defense Clinic	LAW-LW 11540	3.0	A-
Instructor: Christine E Gottlieb, Martin Guggenheim			
Evidence	LAW-LW 11607	4.0	A-
Instructor: Daniel J Capra			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	45.0	45.0

Spring 2022

School of Law
Juris Doctor
Major: Law

International Organizations: The Law and Practice of the United Nations Seminar	LAW-LW 10198	2.0	B+
Instructor: David M Malone			
Family Defense Clinic Seminar	LAW-LW 10251	4.0	A-
Instructor: Christine E Gottlieb, Martin Guggenheim			
Survey of Securities Regulation	LAW-LW 10322	4.0	A-
Instructor: James B Carlson			
Family Defense Clinic	LAW-LW 11540	3.0	A
Instructor: Christine E Gottlieb, Martin Guggenheim			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	58.0	58.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Criminal Procedure: Fourth and Fifth Amendments	LAW-LW 10395	4.0	B+
Instructor: Andrew Weissmann			
Property	LAW-LW 11783	4.0	A-
Instructor: Cynthia L Estlund			
Digital Currency, Blockchains and the Future of Financial Services	LAW-LW 12371	3.0	B
Instructor: Max I Raskin, David L Yermack, Geoffrey P Miller			
Attacking & Defending Corporate Transactions: A Delaware Law Primer	LAW-LW 12709	2.0	A-
Instructor: Randall Baron, Lori W. Will			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	71.0	71.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Professional Responsibility in Criminal Practice Seminar	LAW-LW 10200	2.0	A-
Instructor: Tamara Giwa			
Criminal Procedure: Post-Conviction Simulation	LAW-LW 10675	4.0	A-
Instructor: Randy Hertz			
Antitrust Law	LAW-LW 11164	4.0	A
Instructor: Christopher Jon Sprigman			
Third Party Investment in Litigation: Law, Policy and Practice Seminar	LAW-LW 12782	2.0	A
Instructor: Anthony Sebok			

	AHRS	EHRS
Current	12.0	12.0
Cumulative	83.0	83.0

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

June 05, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to recommend Dhruv Kumar for a judicial clerkship.

Dhruv was a student in the year-long NYU Family Defense Clinic, which I teach. The course consists of a seminar and a fieldwork component, in which law students handle all aspects of the representation of litigants in child welfare cases in Family Court. Because the seminar is small and the supervision of the casework is intensive, I come to know the students' work quite well.

Dhruv's clinic work entailed a broad range of litigation activities, including interviewing and counseling clients, legal research, negotiating with opposing counsel, and preparing for and appearing on the record at court appearances. He brought a combination of intelligence, dedication, and professionalism to all aspects of this work. He paid attention to detail and I was able to rely on him to follow through on all his responsibilities

Dhruv's work on one case, in particular, stood out to me. It involved a novel legal question, concerning the appropriate legal standard for a hearing at which a non-respondent father sought custody of his child, who was in foster care because of allegations against the child's mother (the governing standard was not directly addressed by statute because the father had never had custody and was not charged with any parental unfitness). Dhruv grasped the complexities of the legal question and he appreciated the deep injustice of a father being denied custody of his daughter when he was charged with no wrongdoing. Time and again, Dhruv was able to channel his indignation about the injustice into effective advocacy.

Dhruv fully litigated a hearing on the issue of the father's right to custody, persuasively bringing together the legal argument, which combined sophisticated statutory interpretation and constitutional case law analysis, with a compelling narrative of the facts. For that hearing, Dhruv drafted and executed an effective cross-examination. When the judge unexpectedly limited the scope of that cross-examination, Dhruv was able to improvise in the court appearance to call the witness he had expected to cross-examine as his own witness, changing his prepared cross-examination into a direct examination on the spot—and doing so far more successfully than many more experienced attorneys would have. Then, when the trial court ruled against us, Dhruv, along with his law student partner, drafted an extremely strong appellate stay application on a very tight timeframe.

Dhruv was notably good at seeing different perspectives on an issue and avoiding the black-and-white thinking that law students sometimes fall into. For instance, in another case he worked on, Dhruv was able to identify and grapple with the complex pros and cons of making a prima facie motion to dismiss the matter.

Additionally, Dhruv was a strong contributor to our seminar discussions. I vividly recall a discussion in the seminar in which it was clear that he helped his fellow students consider more deeply the responsibilities inherent in the role of an attorney. He brought to life for his colleagues the gravity of the obligation to serve clients zealously.

Commitment to serving clients was clear throughout Dhruv's work. He worked with two clients who struggled with mental health issues, one of whom also had cognitive limitations. Because of their special needs, effectively counseling these clients posed significant challenges. Dhruv met those challenges with patience and compassion and remained unfailingly client-centered as he represented them.

Finally, I would like to say a word about Dhruv's ability to navigate professional relationships. Having clerked myself, I have a sense of the importance of positive working relationships in judicial chambers. Not only was Dhruv hardworking and professional, but on two occasions I observed him handle particularly challenging interpersonal dynamics extremely well. The first was a situation in which he was on a team that was supervised by two attorneys, who strongly disagreed with each other about the case strategy. I have seen other students struggle in that type of situation, but Dhruv was able to draw on the strengths of each of his two supervisors, while diplomatically navigating the tension between them.

In another situation, Dhruv had a student partner on his team whom I could tell was difficult to work with. The partner struggled with doing her work timely and missed more than one deadline. I am sure it was frustrating to be partnered with that student, but to Dhruv's credit, he never complained about his colleague. Instead, he took constructive steps (increasing communication, and filling in gaps in the work as needed on short notice) to ensure that the client was well served.

For all these reasons, I believe Dhruv would make a strong judicial clerk.

Please do not hesitate to contact me if any additional information would be helpful.

Sincerely,

Christine Gottlieb

Christine Gottlieb - gottlieb@mercury.law.nyu.edu - 212-998-6693

Christine Gottlieb - gottlieb@mercury.law.nyu.edu - 212-998-6693

WHITE & CASE

May 8, 2023

White & Case LLP
555 South Flower Street
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Los Angeles, California 90071-2433
T +1 213 620 7700

whitecase.com

To Whom It May Concern:

My name is Courtney Hague Andrews and I am the hiring partner for White & Case LLP's Los Angeles office. I am writing to offer my strong recommendation of Dhruv Kumar for a judicial clerkship.

I met Dhruv when I interviewed him for our 1L Diversity Fellow position in January 2021. Over two years later, I remember how Dhruv's outstanding personal statement made him stand out, both as a superior writer and as a great fit for the Firm given his background and interest in international disputes. Not only did Dhruv impress me and my colleagues during the interview process, he also made a positive impression on members of the legal team at one of our key clients, who also interviewed and selected him to do a two-week rotation in-house as part of our 1L Diversity Fellow program.

During the first summer he spent with the firm in Los Angeles, Dhruv worked on a variety of commercial litigation, technology disputes, and white collar matters. He received overwhelmingly positive feedback from the Firm attorneys with whom he worked that summer, myself included. Specifically, Dhruv helped conduct legal research in connection with an article I co-authored regarding the evolution of the fiduciary duty of director oversight under Delaware law, and the relationship between corporate governance and risk management and compliance. Dhruv demonstrated a genuine interest in the case law and corporate governance issues, his research was comprehensive and thoughtful, and his written work product was well-organized and well-written.

We were pleased when Dhruv accepted our offer to return to White & Case as a summer associate after his 2L year at NYU Law. He split the summer between our Los Angeles and Miami offices and, in addition to working on commercial litigation, technology disputes, and white collar matters, he spent significant time working with our financial restructuring and insolvency practice on various active disputes. Again, he received stellar reviews. Dhruv's writing mentor, a senior associate in the Los Angeles office, said his writing assignment was "excellent," as well as being "clear, precise, direct and concise."

On a personal level, Dhruv is smart, mature, eager, inquisitive, responsible, and a team player. He was ranked at the top of his class both summers he worked for the firm and we look forward to welcoming him back to the firm as an associate this fall.

I highly recommend Dhruv for a judicial clerkship position. I am confident that Dhruv's strong research and writing skills will make him a valuable team member in any chambers.

WHITE & CASE

May 8, 2023

Please do not hesitate to contact me if you have any questions or require any further information.

Best regards,

Courtney Hague Andrews

Courtney Hague Andrews
Partner

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COURT OF CHANCERY
OF THE
STATE OF DELAWARE

LORI W. WILL
VICE CHANCELLOR

LEONARD L. WILLIAMS JUSTICE CENTER
500 N. KING STREET, SUITE 11400
WILMINGTON, DELAWARE 19801-3734

May 11, 2023

RE: Dhruv Kumar, NYU Law '23

Your Honor:

I am pleased to recommend Dhruv Kumar for a clerkship in your chambers. Dhruv was a student in my Corporate and Transactional Litigation seminar at NYU Law during the fall 2023 semester. Dhruv not only did exceptionally well in class, but also impressed me with his thoughtful participation and strong analytical reasoning skills. I know that he would be an asset to you.

Dhruv has many of the attributes that I look for in hiring my own law clerks. He is always well prepared, irrespective of the length and density of the reading. He comes ready with thought-provoking questions and a keen understanding of the case law at issue. He listens carefully and shows great enthusiasm for learning. And—perhaps just as importantly as his skills—he is a pleasure to spend time with.

My course is built around two mock lawsuits. After students are taught key principles of Delaware corporate law, they write a brief for each lawsuit and give a mock oral argument with a teammate. Both of Dhruv's briefs were top notch. He writes beautifully. His oral arguments were also among the best in class and showed solid teamwork.

Dhruv has given a lot of thought to clerking and decided to pursue it for all the right reasons. He believes that a clerkship will improve and strengthen his legal writing and reasoning skills, allow him to observe a range of advocates, and provide for a singular mentorship opportunity with a judge. He is prepared to work hard and learn much.

Dhruv would be an excellent law clerk for any judge. I wish that he were interested in a Court of Chancery clerkship! But he very much wants the range of matters that a federal clerkship will uniquely expose him to. I recommend him to you without reservation. Dhruv’s intellect and enthusiasm for the law will propel him through a clerkship and launch him into what is sure to be a successful career.

Best regards,

Lori W. Will
Vice Chancellor
Delaware Court of Chancery

This writing sample is a motion *in limine* I wrote as a Summer Associate for the plaintiff in a civil antitrust case. I wrote it to preclude the defendant from introducing evidence about a separate, earlier litigation initiated by the defendant against the plaintiff company's former president. All identifying information has been redacted, and I am using this motion with permission from the partner on the case. It was eventually filed in federal court, and my writing sample is the final draft I submitted.

PLAINTIFF'S MOTION *IN LIMINE* NO. __ TO EXCLUDE DEFENDANT'S 2011 INTELLECTUAL PROPERTY CLAIMS AGAINST PRESIDENT AND TERMS OF 2013 SETTLEMENT AGREEMENT WITH PLAINTIFF

[*Declaration Filed Separately*]

TABLE OF CONTENTS

I. INTRODUCTION

In 2011, defendant Defendant, Ltd. ("Defendant") sued Plaintiff ("Plaintiff") company's former president, President ("President"), alleging that he stole Defendant's intellectual property to develop a colocation datacenter facility and compete with Defendant. *See* Declaration of ____, ¶ _ & Ex. __. In 2013, the parties including Plaintiff settled that lawsuit without any admission of liability or wrongdoing by President or Plaintiff. *See id.* ¶ _ & Ex. __. As part of the settlement, the parties mutually released each other from all claims arising out of Defendant's IP-theft allegations. *See id.* at 3. Nonetheless, Defendant now attempts to resurrect those allegations to justify its anticompetitive practices by claiming that they were taken to protect against the threat of IP theft. *See* Order Granting Plaintiff's Motion to Compel Add'l Responses ("Order Granting Motion to Compel"), at 2; *see also* Joint Pretrial Order ("Pretrial Order"), at 12.

Initially, Defendant should not be permitted to introduce evidence of its prior IP theft allegations against President because Defendant released those claims against President and Plaintiff in the 2013 settlement agreement. But even if there had been no release, those allegations are inadmissible because they are improper character evidence. Allowing Defendant to re-allege those claims would also substantially prejudice Plaintiff while contributing no probative information, especially since the settlement agreement did not include any admission of wrongdoing. The 2013 settlement agreement is similarly irrelevant to this litigation, and Defendant may not attempt to argue that Plaintiff released Defendant from any claims as part of that agreement because that fact also has no probative value. This Court has already held that those releases do not bar the present litigation.

Notwithstanding these admissibility issues, Plaintiff should not be foreclosed from introducing evidence of Defendant's anticompetitive practice of making false statements about alleged IP theft to third parties.

II. BACKGROUND

On ___ _,2011, Defendant filed a lawsuit against President alleging that while employed by Defendant, President "became intimately aware of [Defendant's] trade practice and secrets," including agreements with clients and the "design and operation of [Defendant's] datacenter

facilities, and the like." Ex. __, ¶ 8. Defendant filed the lawsuit after learning that President had developed plans to construct a datacenter on A Avenue in Metropolitan Area. *Id*., ¶ 11. Defendant alleged that in developing those plans, President misappropriated Defendant's intellectual property and used "Defendant's trade agreements and trade secrets to open a competing datacenter" in breach of his confidentiality agreement upon leaving the company, resulting in an allegedly unfair commercial advantage for President. *Id*., ¶¶ 26-35. Defendant also alleged tortious interference, claiming that President "enticed certain companies who were key contractors and architects of Defendant's colocation facilities to participate in the construction of his project using technical drawings and schematics either identical to or materially similar to those owned by Defendant . . . to construct the Defendant datacenters." *Id*., ¶ 31. Defendant also alleged copyright infringement as to President's use of that information. *Id*., ¶ 54.

On _____ _, 2013, the parties settled Defendant's lawsuit against President. At no time, including in the settlement agreement, did any court find President liable for, or did President or Plaintiff admit to, the conduct or violations alleged by Defendant in the lawsuit. *See* Declaration of _____, ¶ _ & Ex. __, at 3. In addition, as this Court has already held, there was no admission of liability by President or Plaintiff in the settlement agreement. *See* Order Denying Defendant's Motion to Dismiss, at 2 ("The Settlement Agreement — to which Plaintiff is also a signatory — does not contain any admission of liability"). As part of the settlement, the parties agreed that President would pay only the "nominal sum" of $40,000 to a charity organization. *Id*.

Following the settlement, Plaintiff opened a different data center, on B Avenue, which industry experts predicted would be successful. Despite being well-poised to compete in the market, Plaintiff was forced to close less than three years later because of Defendant's anticompetitive scheme to eliminate competition, including Plaintiff, from the market. One of Defendant's practices involved its requirement that its customers and other third parties that used Defendant's facilities abide by its Acceptable Use Policy ("AUP"), which generally forbade Defendant's customers and third parties from dealing with other colocation datacenters in the Metropolitan Area market if they also sought to do business with Defendant. *See* Declaration of

____, ¶ _ & Ex. __; Order Granting Plaintiff's Motion to Compel Add'l Responses ("Order Granting Motion to Compel") at 2. On _____ _, 2017, Plaintiff filed its complaint. On _____ _, 2018, the Court denied Defendant's motion to dismiss the complaint. On _____ _, 2021, the Court denied Defendant's motion for summary judgment on Plaintiff's antitrust claims, which are set for trial on _____ _, 2021.

Defendant has represented that it intends to defend its anticompetitive scheme by contending that its practices were necessary to protect against the threat of intellectual property and trade secret theft by President and Plaintiff. *See* Pretrial Order at 12; Defendant's Motion for Summary Judgment at 14-15 ("it was Defendant's absolute right to place conditions on its customers' use of Defendant's data center . . . particularly after Plaintiff first tried to steal Defendant's intellectual property").

The last court ruling in Defendant's 2011 litigation against President, prior to the settlement, was an order holding that Defendant had not described the allegedly stolen trade secrets with sufficient particularity for President to respond. *Defendant v. President*, at *23-24 (D. ___ ___ _, 2012). During the discovery phase of the present litigation, Plaintiff served two interrogatories on Defendant requesting that Defendant identify the specific IP and trade secrets it claims President stole. Defendant provided vague responses to these interrogatories multiple times, resulting in an order from this Court requiring Defendant to supplement its responses. *See* Order Granting Motion to Compel at 9 ("A threshold inquiry for Plaintiff to challenge the defense is determining what trade secrets or intellectual property Defendant contends were stolen (*i.e.*, the basis for its alleged concern in requiring AUPs)"). Defendant's supplemental responses still fail to identify with any particularity the trade secrets and intellectual property Defendant claims President stole. *See* Defendant's Fourth Supplemental Responses to Plaintiff's First Set of Interrogatories, Nos. 16-17.

III. ARGUMENT

A. Defendant May Not Present Evidence of Its Baseless IP-Theft Allegations Against President

As part of its defense, Defendant has argued that its AUP—and particularly the 2013 AUP

specifically naming Plaintiff—was not anticompetitive, but rather was a reasonable protective measure guarding against the alleged IP theft that underlay Defendant's 2011 litigation against President. *See* Order Granting Plaintiff's Motion to Compel at 2. Beyond acknowledging the existence of the 2011 litigation, Defendant's IP-theft allegations against President should be excluded on the following grounds.

Improper Character Evidence. First, evidence of Defendant's 2011 IP-theft allegations against President is inadmissible because it is improper character evidence. The Federal Rules of Evidence provide that "[e]vidence of any . . . crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b). Defendant's claims of President's trade secret theft allege the commitment of a "crime, wrong, or act" by President. *Id*. Defendant cannot use those allegations to defend its anticompetitive practices by showing that President would have acted "in accordance with [that] character" on a later occasion. *Id*. While Rule 404(b)(2) states that character evidence could be admissible if used for an alternative purpose, such as to "prov[e] motive, opportunity, intent, preparation, plan, [and] knowledge," Defendant does not make its allegations for any of those purposes. To the extent that Defendant seeks to use its allegations of President's trade secret theft to defend its own anticompetitive conduct, it would be solely to prove that President and Plaintiff would have acted in conformity therewith on a subsequent occasion. Nonetheless, if Defendant could introduce evidence of its allegations under that exception by attempting to use it for an "alternate purpose" specified in Rule 404(b)(2), the rule requires evidence "sufficient to support a finding" that the prior act in question was actually committed. *United States v. Romero*, 282 F.3d 683, 688 (9th Cir. 2002).[1] The Supreme Court further clarified that the standard for this criterion is whether "there is sufficient evidence to support a finding by the jury" that the initial act was committed. *Huddleston v. United States*, 485 U.S. 681, 685 (1988). If the character evidence only consists of allegations from a prior civil

[1] Under the Ninth Circuit's four-part test for the admissibility of character evidence, such evidence may be admitted if "(1) the evidence tends to prove a material point; (2) the other act is not too remote in time; (3) the evidence is sufficient to support a finding that defendant committed the other act; and (4) (in certain cases) the act is similar to the offense charged." *Romero*, 282 F.3d at 688.

action, that evidence is inadmissible where the prior civil action settled without an admission of liability. *See United States v. Bailey*, 696 F.3d 794, 799 (9th Cir. 2012) ("Admitting prior conduct charged but settled with no admission of liability is not probative of whether the defendant committed the prior conduct"). Defendant's defense to its anticompetitive practices—that it faced a threat of IP theft from Plaintiff—relies on its 2011 civil allegations against President. *See* Pretrial Order at 12; Order Granting Plaintiff's Motion to Compel at 2. However, there is no "evidence…sufficient to support a finding that [Plaintiff] committed the other act" because it is a "prior civil action settled without an admission of liability" as there was no finding of liability in that litigation, which settled in 2013, and the settlement agreement contained no admission of liability. *Romero*, 282 F.3d at 688; *Bailey*, 696 F.3d at 799; *see* Ex. __; Order Denying Defendant's Motion to Dismiss at 2. Any attempt by Defendant to re-raise those allegations therefore fails the test to allow otherwise inadmissible character evidence, and the content of Defendant's 2011 allegations against President should be excluded.

Prejudice. Even if Defendant's IP-theft allegations against President are admissible character evidence under Rule 404, any probative value is substantially outweighed by its prejudicial impact. Fed. R. Evid. 403; *see also Romero*, 282 F.3d at 688 ("If the evidence meets this test under Rule 404(b), the court must then decide whether the probative value is substantially outweighed by the prejudicial impact under Rule 403"). Admitting evidence of Defendant's 2011 IP-theft claims would be prejudicial to Plaintiff without adding any probative value.

Defendant's IP-theft allegations have no basis and therefore provide no probative value. Indeed, as discussed *supra*, the prior litigation settled without a finding of liability, the 2013 settlement agreement contained no admission of liability, and Defendant released its IP-theft claims as part of the agreement. In addition, there is simply not enough evidence supporting Defendant's 2011 allegations such that Defendant could raise them here without prejudicing Plaintiff. For example, Defendant failed to adequately respond to interrogatories requesting identification of what specifically President stole. Even the information provided in Defendant's responses to Plaintiff's interrogatories concerning the alleged IP theft fails to provide any basis

for Defendant's naked allegation that President stole Defendant's IP. *See* Defendant's Fourth Supplemental Responses to Plaintiff's First Set of Interrogatories, Nos. 16-17. A failure to adequately respond to interrogatories that request specific identification of patent infringement claims limits their "ability to substantively prepare for trial," and even if the responses are cured at a later point in the litigation, the initial failure to respond "warrants exclusion of late-added infringement theories at trial." *Guzik Tech. Enters. v. Western Digital Corp.*, No. 11-CV-03786, 2013 U.S. Dist. LEXIS 171327, at *31-32 (N.D. Cal. Nov. 22, 2013). Defendant justifies its AUPs that forbid its customers from interacting with Plaintiff by claiming that the AUPs simply protect its IP from being exploited by President, but even after being compelled by this Court to supplement its responses to the interrogatories, Defendant is still unable to describe with specificity what President allegedly stole. *See* Order Granting Motion to Compel at 10; Declaration of ___ _____ in Supp. of Plaintiff's Motion *in Limine* #1 ("____ Decl."). Many of the alleged trade secrets are not actual trade secrets. For example, the customer lists are posted on Defendant's website, and its pricing is straightforward and conforms to industry norms. *See* Declaration of ____, ¶ _ & Ex. __, ¶ 6-8. Defendant's failure to respond to Plaintiff's interrogatories with specificity limits Plaintiff's "ability to substantively prepare for trial and warrants exclusion" of the 2011 litigation's IP theft allegations. *Guzik*, 2013 U.S. Dist. LEXIS 171327 at *31-32.

The Fourth Supplemental Responses also do not explain how President used the allegedly stolen trade secrets to start a competing facility. *See* Ex. __. In fact, the facility for which Defendant alleges President stole trade secrets is not the facility that Plaintiff ultimately opened. Defendant alleged that President stole Defendant's IP to open a competing datacenter in a new building on A Avenue. *See* Ex. __ ¶ 11. However, the A facility never materialized; instead, Plaintiff ultimately opened its data center on B Avenue in a preexisting structure. *See* Declaration of ____, ¶ _ & Ex. __. As a result, even if Defendant's allegations of trade secret theft could be substantiated, there is no evidence that President used any of Defendant's IP to develop Plaintiff's facility. Those allegations therefore contribute no probative value to the question of whether Defendant faced a real threat of theft by President or Plaintiff, and evidence of those allegations

would only prejudice the jury against Plaintiff.

Admitting that evidence is also prejudicial because President was required to delete materials central to those allegations as part of the settlement agreement. *See* Ex. ___, ¶ 11 ("Destruction of Documents"). With those materials destroyed by the time the present litigation commenced, Plaintiff's ability to conduct discovery on Defendant's use of those allegations as a defense was inhibited, thereby preventing Plaintiff from being able to "substantively prepare for trial" and respond to Defendant's accusations. *See id*. The destruction of evidence relevant to a party's contentions or defenses is prejudicial where the destruction results in a deprivation of "the best objective evidence . . . for an independent trier of fact" because it "impair[s] [Plaintiff's] ability to obtain a full and fair trial by jury on all issues raised . . . [t]his is particularly so where issues of intent and conduct have been raised on both sides and where conflicting oral testimony may be offered by both parties," as is the case here. *Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443, 1450-51 (C.D. Cal. 1984). The 2013 settlement agreement explicitly required that President destroy "all Documents . . . wherever stored," defining "Documents" as "any and all materials in any medium of expression that contain non-public information pertaining to Defendant or Defendant's intellectual property." Ex. ___, ¶ 11. Without that provision, to refute Defendant's allegations Plaintiff could have turned over the totality of information President possessed.[2] But the destruction of that "best objective evidence" would "impair [his] ability to obtain a full and fair trial," especially since it concerns "issues of intent and conduct" in the face of conflicting testimony. Because Plaintiff can no longer access those documents, admitting evidence of Defendant's IP theft allegations would substantially prejudice Plaintiff.

Release of IP Claims. Evidence of Defendant's 2011 IP-theft allegations against President is also inadmissible because Defendant's release of its IP-theft claims against President in the 2013 settlement agreement estops Defendant from using those allegations to defend its anticompetitive practices in this case. If a party specifically releases the factual allegations

[2] Documents that have been destroyed may not be presumed irrelevant. *See Leon v. IDC Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006).

underlying a claim, it should be foreclosed from re-raising those allegations as a defense in unrelated litigation. *See Cal. Expanded Metal Prods. Co. v. Klein*, No. C18-0659, 2018 U.S. Dist. LEXIS 202850, at *27 n.10 (W.D. Wash. Nov. 29, 2018). The plaintiffs in *Klein* attempted to argue that the defendants "should be estopped from asserting [an] affirmative defense" because they had granted the plaintiffs a release to those assertions in an earlier settlement agreement. *Id.* The *Klein* court noted that it would have considered the plaintiffs' argument had they "furnished evidence in their motion to support the contention that under the . . . settlement agreement, Defendants agreed to 'release' the 'factual allegations' underlying [the] affirmative defense." *Id.* Consistent with the *Klein* footnote, Defendant, President, and Plaintiff mutually agreed to "release each other from any claims arising out of the facts related to the [2011] lawsuit" to settle the lawsuit against President that alleged IP theft. Ex. ___, ¶ 3. Since Defendant specifically agreed to release the factual allegations underlying its claims of IP theft, it should be estopped from asserting those claims to defend its anticompetitive practices.

B. Defendant May Not Present Evidence About the Substance of the 2013 Settlement Agreement

Defendant may not introduce evidence relating to the terms of the 2013 settlement agreement between the parties because the content of the agreement makes no claim, defense, or fact at issue in the present litigation more or less probable. *See* Fed. R. Evid. 401. The recitals contain Defendant's 2011 allegations regarding President's behavior along with some specific factual admissions by President, but they do not contain any admission of the factual claims underlying the IP-theft allegations, nor do they contain any admission of legal liability. *See* Ex. __ at 1. As discussed *supra*, that mutual release term directly states that all parties "agree[d] to mutually release each other from any claims arising out of the facts related to the [2011] lawsuit" to conclude that litigation without any finding of liability. *Id.*, ¶ 3. Because there was no finding in the 2011 lawsuit, no admission of liability, no admission of the material facts underlying the lawsuit, and the parties mutually released each other from all claims relating to the IP allegations, introducing the content of the 2013 settlement agreement would not make any defense by Defendant more or less probable. *See Bailey*, 696 F.3d at 800 ("A defendant may settle a case for

a variety of reasons. He may have committed the conduct alleged in the complaint or he may not have—but having settled the claim, there is no way to know"). The terms of the settlement agreement provide no information concerning whether the alleged IP theft occurred or that Defendant had a legitimate IP theft claim. Without an admission of liability, the contents of the settlement agreement cannot be used to substantiate mere allegations. Therefore, the 2013 settlement agreement is irrelevant and inadmissible.

Plaintiff's release of Defendant from certain claims as part of the 2013 settlement agreement is also inadmissible since that release has no implication for the present litigation. That Plaintiff released Defendant from certain claims makes no fact in dispute more or less probable, especially given this Court's explicit finding that Plaintiff did not release its current claims against Defendant in the settlement agreement, other than claims based on Defendant's pre-settlement online statements about President. *See* Order Denying Defendant's Motion to Dismiss at 7 ("There is no plain language [in the agreement] from which a reasonable person could conclude that [Plaintiff] w[as] releasing future claims based on new conduct that occurred after the settlement agreement was executed. Accordingly, the Court denies the motion to dismiss the Complaint based on the…settlement agreement."); Order Re Motions for Summary Judgment at 17-18; *see* Fed. R. Evid. 401. Because the 2013 settlement agreement has no bearing on the present litigation, the Court should preclude Defendant from presenting evidence of its substance.

C. Plaintiff May Present Evidence of Defendant's Anticompetitive Disparagement

While Defendant may not introduce evidence of its 2011 allegations against Plaintiff or the terms of the 2013 settlement agreement, Plaintiff may properly introduce evidence of Defendant's anticompetitive practice of making disparaging statements to potential customers and other third parties about competitors—including that some of Plaintiff's employees were "liars" and "thieves" and that Plaintiff stole IP from Defendant. *See* Compl. ¶¶ 90-93. Although Defendant's 2011 allegations of IP theft and the terms of the 2013 settlement agreement are inadmissible, evidence of Defendant's disparagement of Plaintiff to third parties is distinct

because its statements made to *third parties* accusing Plaintiff or its employees of IP theft are probative in determining whether Defendant used anticompetitive practices. Defendant's own expert admits that false statements alone are sufficient to establish harm to competition, and this Court decided that "[q]uestions of material fact exist as to whether Defendant's actions had anticompetitive effects," including Defendant's false statements made to third parties about Plaintiff. *See American Prof'l Testing Serv. v. Harcourt Brace Jovanovich Legal & Professional Publs.*, 108 F.3d 1147, 1152 (9th Cir. 1997) ("false or misleading statements directed at competitors is not . . . competition on the merits"); Ex. ___ at 238:7-10; Order Re Motions for Summary Judgment at 5. If Plaintiff were to present evidence that those disparaging statements were indeed false, the purpose and effect of that evidence would be to demonstrate that making the statements to third parties had no merit and constituted anticompetitive behavior, whereas evidence of the settled litigation against President has no bearing on Plaintiff's claims or Defendant's defenses. Therefore, while Defendant may not introduce evidence of its IP theft allegations or the 2013 settlement agreement, the Court should permit Plaintiff to present evidence of Defendant's disparaging statements to third parties about Plaintiff, including its allegations that President stole its trade secrets.

IV. CONCLUSION

The Court should deny Defendant's attempts to present evidence relating to its 2011 intellectual property claims against President and the terms of the 2013 settlement of those allegations.

Applicant Details

First Name	**Sam**
Middle Initial	**D**
Last Name	**Lachow**
Citizenship Status	**U. S. Citizen**
Email Address	**lachow.sam@gmail.com**
Address	**Address** Street **70 East 12th Street, Apartment 2A** City **NEW YORK** State/Territory **New York** Zip **10003** Country **United States**
Contact Phone Number	**9145231408**

Applicant Education

BA/BS From	**Northwestern University**
Date of BA/BS	**June 2015**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 15, 2022**
Class Rank	**30%**
Law Review/Journal	**Yes**
Journal(s)	**Federal Circuit Bar Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Dickinson, Laura
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Frieden, Paul
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kweisburd@law.gwu.edu
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Samuel D. Lachow
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(914) 523-1408

May 8, 2023

The Honorable Kiyo A. Matsumoto
United States District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Dear Judge Matsumoto:

I am writing to apply for a clerkship in your chambers for the 2025-2026 term or later terms. I am a recent graduate of The George Washington University Law School. Before law school I was a paralegal specialist for three years for the U.S. Attorney's Office for the Southern District of New York in the Complex Frauds & Cybercrime Unit. I was lucky enough to work on six different criminal trials and countless investigations. I am currently a law clerk at Fried Frank where I have predominantly worked on white collar investigations and securities litigation. I hope to one day join the U.S. Attorney's Office.

Enclosed please find my resume, writing sample, law school transcript, undergraduate transcript, and recommendation letters from the following individuals:

Laura A. Dickinson
Professor of Law, National Security and Human Rights
Oswald Symister Colclough Research Professor of Law
The George Washington University Law School
dickinson@law.gwu.edu

Kate Weisburd
Associate Professor of Law, Criminal Procedure
The George Washington University Law School
kweisburd@law.gwu.edu

Paul L. Frieden
Professional Lecturer in Law, Employment Law
The George Washington University Law School
plfrieden12@gmail.com

Assistant United States Attorneys Noah Solowiejczyk (noahsolow@gmail.com), Kate Reilly (Katherine.Reilly2@usdoj.gov), and Dave Abramowicz (david.abramowicz@gmail.com), who I worked closely with in my time at the U.S. Attorney's Office are also happy to discuss my performance and work ethic.

Please let me know if I can provide any additional information. Thank you very much for your consideration and I hope to hear from you soon.

Respectfully,

Samuel D. Lachow

Samuel Dylan Lachow

70 East 12th Street Apartment 2A, NY, NY 10003 • 914-523-1408 • Lachow.Sam@gmail.com

EDUCATION

The George Washington University Law School — Washington, D.C.
Juris Doctor (Graduated with Honors) — May 2022
- *Activities*: Member of the Federal Circuit Bar Journal

Benjamin N. Cardozo School of Law — New York, NY
Attended — Aug. 2019 - July 2020

Northwestern University — Evanston, IL
Bachelor of Arts, Political Science — June 2015
Minor in Business Institutions
Marketing Certificate, Medill School of Journalism

EXPERIENCE

Fried Frank — New York, NY
Litigation Associate — September 2022 - Present
- Assisting Partners and Associates on white collar and securities litigation matters

Fried Frank — New York, NY
Summer Associate — June 2021 – Aug. 2021
- Assisted Partners and Associates on litigation and pro-bono matters
- Created timelines, analyzed emails on relativity and researched various legal topics for multiple white collar and government investigations

New York City Department of Investigation — New York, NY
Legal Intern — June 2020 - Aug. 2020
- Assisted Assistant General Counsel with a memorandum on defamation law in New York state
- Conducted research on the repeal of section 50-a of the New York Civil Rights Law and on the amendments to the Freedom of Information Law (FOIL)

United States Attorney's Office — New York, NY
Southern District of New York — Oct. 2016 - July 2019
Paralegal Complex Frauds and Cybercrime Unit
- Assisted Assistant United States Attorneys in trials, investigations, sentencings, and arraignments
- Produced discovery using Relativity, edited and reviewed subpoenas, and sentencing memoranda
- Paralegal for *United States of America v. James Gatto et al.*, a landmark case involving the corruption in the National Collegiate Athletic Association (NCAA) Basketball underworld
- Summary witness in *United States of America v. William Cosme*, documented fraudulent activity

Accenture — New York, NY
Strategy Analyst — Oct. 2015 - Sept. 2016
- Provided operating model and marketing analysis for Fortune 500 financial services corporation

VOLUNTEERING

Jewish Association for Services for the Aged — New York, NY
Volunteer — Mar. 2020 - Present

HOBBIES

- Created and host a sports and politics podcast, The Lach Podcast, with 30+ episodes, available on Apple Podcasts: Guests include United States Senator Cory Booker and journalists from ESPN, CBS, TNT, USA Today. Also co-host a podcast focusing on the Brooklyn Nets

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G45463088
Date of Birth: 01-DEC

Date Issued: 31-OCT-2022

Record of: Samuel D Lachow

Page: 1

Student Level: Law
Admit Term: Fall 2020

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Current College(s):Law School
Current Major(s): Law

Degree Awarded: J D 15-MAY-2022
With Honors
Major: Law

JD RANK: 187/549

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
NON-GW HISTORY:			
2019-2020	Yeshiva University		
LAW 6202	Contracts	2.00	TR
LAW 6206	Torts	4.00	TR
LAW 6208	Property	5.00	TR
LAW 6209	Legislation And Regulation	2.00	TR
LAW 6210	Criminal Law	3.00	TR
LAW 6212	Civil Procedure	5.00	TR
LAW 6214	Constitutional Law I	3.00	TR
LAW 6216	Fundamentals Of Lawyering I	3.00	TR
LAW 6700	Contract II	3.00	TR
Transfer Hrs: 30.00			
Total Transfer Hrs: 30.00			
GEORGE WASHINGTON UNIVERSITY CREDIT:			
Fall 2020			
Law School			
Law			
LAW 6250	Corporations Manns	4.00	A
LAW 6268	Employment Law Frieden	2.00	A-
LAW 6360	Criminal Procedure Weisburd	3.00	A
LAW 6657	Fed Circuit Bar Jrnl Note	1.00	P
LAW 6870	National Security Law Dickinson	3.00	A+
Ehrs 13.00 GPA-Hrs 12.00 GPA 4.028			
CUM 13.00 GPA-Hrs 12.00 GPA 4.028			
Good Standing			
GEORGE WASHINGTON SCHOLAR			
TOP 1% - 15% OF THE CLASS TO DATE			

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Spring 2021			
Law School			
Law			
LAW 6218	Professional Responslbty/Ethic Tuttle	2.00	B
LAW 6230	Evidence Braman	3.00	B+
LAW 6348	Family Law Ross	4.00	A-
LAW 6474	Trademark & Unfair Compet Law Brauneis	3.00	A
LAW 6657	Fed Circuit Bar Jrnl Note	1.00	P
Ehrs 13.00 GPA-Hrs 12.00 GPA 3.556			
CUM 26.00 GPA-Hrs 24.00 GPA 3.792			
Good Standing			
GEORGE WASHINGTON SCHOLAR			
TOP 1% - 15% OF THE CLASS TO DATE			
Fall 2021			
LAW 6400	Administrative Law Glicksman	3.00	B
LAW 6410	Health Law And Policy Sage	4.00	B+
LAW 6538	Immigration Law Fresco	3.00	A
LAW 6640	Trial Advocacy Gilligan	3.00	B+
LAW 6660	Federal Circuit Bar Journal	1.00	CR
Ehrs 14.00 GPA-Hrs 13.00 GPA 3.410			
CUM 40.00 GPA-Hrs 37.00 GPA 3.658			
Good Standing			
THURGOOD MARSHALL SCHOLAR			
TOP 16% - 35% OF THE CLASS TO DATE			

********** CONTINUED ON PAGE 2 **********

University Registrar

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THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G45463088
Date of Birth: 01-DEC

Date Issued: 31-OCT-2022

Record of: Samuel D Lachow

Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Spring 2022			
LAW 6300	Federal Income Tax Brown	3.00	A-
LAW 6362	Adjudicatory Criminal Pro. Lee	3.00	B+
LAW 6364	White Collar Crime Eliason	3.00	B+
LAW 6380	Constitutional Law II Smith	4.00	B
LAW 6660	Federal Circuit Bar Journal Schwartz	1.00	CR
Ehrs 14.00 GPA-Hrs 13.00 GPA 3.308			
CUM 54.00 GPA-Hrs 50.00 GPA 3.567			
Good Standing			

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	54.00	50.00	178.33	3.567
TOTAL NON-GW HOURS	30.00	0.00	0.00	0.00
OVERALL	84.00	50.00	178.33	3.567

########## END OF DOCUMENT ##########

University Registrar

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Office of the Registrar
THE GEORGE WASHINGTON UNIVERSITY
Washington, DC 20052

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DESIGNATION OF CREDIT

All courses are taught in semester hours.

TRANSFER CREDIT

Transfer courses listed on your transcript are bonafide courses and are assigned as advanced standing. However, whether or not these courses fulfill degree requirements is determined by individual school criteria. The notation of TR indicates credit accepted from a postsecondary institution or awarded by AP/IB exam.

EXPLANATION OF COURSE NUMBERING SYSTEM

All colleges and schools beginning Fall 2010 semester:

1000 to 1999	Primarily introductory undergraduate courses.
2000 to 4999	Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
5000 to 5999	Special courses or part of special programs available to all students as part of ongoing curriculum innovation.
6000 to 6999	For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office.
8000 to 8999	For master's, doctoral, and professional-level students.

All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:

001 to 100	Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
101 to 200	Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work.
201 to 300	Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
301 to 400	Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students. School of Business – Limited to doctoral students.
700s	The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
801	This number designates Dean's Seminar courses.

The Law School

Before June 1, 1968:

100 to 200	Required courses for first-year students.
201 to 300	Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval.
301 to 400	Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

After June 1, 1968 through Summer 2010 semester:

201 to 299	Required courses for J.D. candidates.
300 to 499	Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
500 to 850	Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and
School of Public Health and Health Services before Fall 2010 semester:

001 to 200	Designed for students in undergraduate programs.
201 to 800	Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences.

CORCORAN COLLEGE OF ART + DESIGN

The George Washington University merged with the Corcoran College of Art + Design, effective August 21, 2014. For the pre-merger Corcoran transcript key, please visit http://go.gwu.edu/corcorantranscriptkey

THE CONSORTIUM OF UNIVERSITIES OF THE WASHINGTON METROPOLITAN AREA

Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

AU	American University	MMU	Marymount University
CORC	Corcoran College of Art & Design	MV	Mount Vernon College
		NVCC	Northern Virginia Community College
CU	Catholic University of America	PGCC	Prince George's Community College
GC	Gallaudet University	SEU	Southeastern University
GU	Georgetown University	TC	Trinity Washington University
GL	Georgetown Law Center	USU	Uniformed Services University of the Health Sciences
GMU	George Mason University		
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS

Undergraduate Grading System

A, Excellent; *B,* Good; *C,* Satisfactory; *D,* Low Pass; *F,* Fail; *I,* Incomplete; *IPG,* In Progress; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *P,* Pass; *NP,* No Pass; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the *I* is replaced by the final grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.
Effective Fall 2003: The grading symbol R indicates need to repeat course.
Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I/* and the grade.
Effective Fall 1987: The following grading symbols were added*: A-, B+, B-, C+, C-, D+, D-.*
Effective Summer 1980: The grading symbols: *P,* Pass, and *NP,* No Pass, replace *CR,* Credit, and *NC,* No Credit.

Graduate Grading System

(Excludes Law and M.D. programs.) *A,* Excellent; *B,* Good; *C,* Minimum Pass; *F,* Failure; *I,* Incomplete; *IPG,* In Progress; *CR,* Credit; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 1994: The following grading symbols were added: *A-, B+, B-, C+, C-* grades on the graduate level.

Law Grading System

A+, A, A-, Excellent; *B+, B, B-,* Good; *C+, C, C-,* Passing; *D,* Minimum Pass; *F,* Failure; *CR,* Credit; *NC,* No Credit; *I,* Incomplete. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.

M.D. Program Grading System

H, Honors; *HP,* High Pass; *P,* Pass; *F,* Failure; *IP,* In Progress; *I,* Incomplete; *CN,* Conditional; *W,* Withdrawal; *X,* Exempt, *CN/P,* Conditional converted to Pass; *CN/F,* Conditional converted to Failure. Through Summer 2014 the *I* was replaced with *I* and the final grade.

For historical information not included in the transcript key, please visit http://www.gwu.edu/transcriptkey

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May 08, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing to recommend my former student, Sam Lachow, for a clerkship in your chambers. Sam is a strong student with excellent legal research, analysis, and writing skills. I give him my very strong recommendation.

Sam enrolled in my national security law class at GW Law School in the fall of 2020, and he soon stood out as a top student. The course is especially demanding because it covers many bodies of law (international and domestic, constitutional and statutory) and the legal issues are difficult and complex. Students must parse the intricacies of the Foreign Intelligence Surveillance Act (FISA), comprehend the detailed procedures related to criminal prosecutions in U.S. military commissions, as well as understand fundamental principles of constitutional law regarding separation of powers and the use of force. Furthermore, I demand a lot of the students in class, as I use the Socratic method to call on them every day, although I do also take volunteers. Sam distinguished himself from the start of the semester both when called on and as a volunteer. He was unfailingly well-prepared for class and gave thoughtful, careful responses to the questions I posed. In particular, he was not only good at analyzing the case, statute, or treaty at hand but also at evaluating any hypotheticals I would throw at him. As a volunteer, he contributed well-reasoned, interesting points to the class discussion in a way that engaged other students' perspectives helpfully and respectfully. The class was better for his participation. And, as this was the year in the pandemic that we taught entirely online, I was especially grateful for his thoughtful engagement in class.

I was therefore not surprised when I discovered that Sam had written a top-notch exam, and indeed was the very best exam in the class. It was clear, well-written, and hit all the major points in the issue-spotter questions I had asked. He also produced a beautifully-reasoned argument on the other part of the exam, the so-called "policy" question, in which I asked students to recommend amendments to the Foreign Intelligence Surveillance Act (FISA). I should also note that Sam's performance on the exam was a particularly distinctive feat, as the class that year consisted of an unusually strong group of students, some of whom were earning L.L.M.'s after working in the national security field as military lawyers, in the U.S. Congress, at the U.S. Department of State, or Central Intelligence Agency. Sam's performance in my class is not an aberration either. At a law school with a strict (and low) grading curve, Sam's academic record is solid and speaks for itself. He graduated with honors and is in the top cohort of his class at GW Law.

Based on Sam's performance in class, I asked him to serve as my research assistant, and he did a first-rate job. He helped me to research a wide variety of issues concerning the litigation surrounding the detainees at Guantanamo Naval Base. In particular, I asked him to identify subtle changes in the types of legal arguments Biden administration officials were making in comparison to Trump administration officials. His research was thorough and his analysis meticulous – it was a great help to me as I wrote a series of blog posts and book chapters on the topic. Furthermore, I was very impressed not just with Sam's substantive skills but also his professionalism. He responded promptly and thoroughly to all requests and also was proactive in ensuring that he was fully implementing what I had asked her to do. In short, he went above and beyond, and was a pleasure to work with.

I should also note that Sam was deeply engaged in leadership roles within the GW community as well, which is significant in light of the fact that he was a transfer student and during the pandemic year. For example, he was an active member of the competitive Federal Circuit Bar Journal. Sam is also a fun person with interests beyond the law. For example, he is an avid sports fan and started his own podcast.

In sum, I think highly of Sam. His analytic and writing abilities are strong. And his collegiality and professionalism make it clear that he would be both conscientious and a pleasure to work with. I recommend that you give his application very careful consideration.

Best regards,

Laura A. Dickinson
Oswald Symister Colclough Research Professor
and Professor of Law
The George Washington Law School
(202) 994-0376
ldickinson@law.gwu.edu

May 08, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing this letter to highly recommend Samuel Lachow for the position of a judicial clerkship. I am a Professorial Lecturer in Law at George Washington University Law School, and Sam was a student in my Employment Law class in the Fall of 2020. I have stayed in touch with Sam since that class ended.

To give you some idea of who I am, I worked for the U.S. Department of Labor for 40 years, most of which (some 21 years) were spent as Counsel for Appellate Litigation in the Fair Labor Standards Division (FLSD) of the Office of the Solicitor. In that role, I was responsible for the large appellate docket of the division, supervising briefs and oral arguments before the United States courts of appeals throughout the country. I also worked, in close collaboration with the Solicitor General's Office, on several Supreme Court briefs and oral arguments that involved the Fair Labor Standards Act. Before assuming that role, I personally wrote briefs and argued many cases before the courts of appeals, both as a line attorney and as the Assistant Counsel for Appellate Litigation in FLSD. In 2020, I received the Philip Arnow Award, which is given annually to one DOL employee in recognition of superior accomplishments and service to the Department. It is the highest honor bestowed by the Department of Labor.

Besides falling within the highest range of grades for the Employment Law class that I taught (he received an A-), Sam was an exemplary student overall. He asked extremely probing questions in class, and outside of the classroom, Sam and I engaged in many email exchanges in which he challenged basic premises and went straight to the heart of the issues with which we dealt. Sam was always very polite in posing the questions, and appreciative for the back and forth that we had.

Sam made me think long and hard about the principles I was trying to convey to the class, and, indeed, on a few occasions, he forced me to reexamine those principles; he made me see things in a new light, which is, in my view, a rare gift for a student to have in their relationship with their law school professor.

Indeed, I have rarely encountered a mind as keenly analytical or questing as Sam's. It is precisely the quality that I would be looking for if I were a judge—someone who could support with great legal acumen what I want to relate to the reader of a judicial opinion I have written, and someone who will make sure I have covered all the bases and thought through every possible angle and permutation of that opinion.

Sam will be graduating from GW Law School right around the top third of his class. As you know, GW Law is a very competitive law school, and Sam has thrived there. He is now with the prestigious law firm of Fried Frank, working on, on among other matters, white collar and securities litigation. Prior to attending law school, Sam had experience working with the United States Attorney's Office in the Southern District of New York, where he worked as a paralegal in the Complex Frauds and Cybercrime Unit, and with the New York City Department of Investigation, where he worked on issues involving defamation and the New York Civil Rights Law. This varied experience will serve him well in a clerkship.

Interestingly, Sam also created and hosts a sports and politics podcast—The Lach Podcast—on which he has interviewed Senator Cory Booker from New Jersey and many prominent journalists. This particular venture reveals the initiative that Sam can bring to bear on a project. Perhaps most importantly, Sam is a fine human being. This is borne out by his ongoing volunteer work for the Jewish Association for Services for the Aged and, more generally, by his kind and engaging disposition and character. I have enjoyed all of my interactions with Sam greatly.

In sum, I strongly believe that Sam would be a first-rate judicial law clerk. He is a true student of the law, and his inquisitiveness, thoroughness, doggedness, and sharpness will help to greatly improve the work coming out of any judicial quarters.

Please feel free to call or email me if you would like to discuss Sam's credentials. I would be happy to speak, or correspond, with you at your convenience.

Thank you very much for taking this letter into consideration.

Sincerely,

Paul Frieden
Professorial Lecturer in Law
The George Washington University Law School
301-633-1485
paulfrieden12@law.gwu.edu
plfrieden12@gmail.com

Paul Frieden - plfrieden12@gmail.com

May 08, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

It is with pleasure that I write in support of Samuel Lachow's clerkship application. Sam was my student in Criminal Procedure in the fall of 2020. Even though our class was on Zoom, Sam was always very engaged.

Sam's performance in Criminal Procedure was excellent, and he received a grade of A. Sam spoke often in class and met with me during office hours. Sam's comments always demonstrated both analytical engagement and mastery of the material. Because of Sam's previous experience working as a paralegal with the U.S. Attorney's Office for the Southern District of New York his comments and questions were especially insightful and added so much to the discussions. Sam also appeared to enjoy the nuances of criminal procedure and thinking through all the different arguments and counterarguments. These qualities will serve him well in a clerkship.

Although I did not have the opportunity to review Sam's legal research and writing, it was clear in class – and based on his exam – that he has very strong analytical stills. Likewise, he is not shy in expressing his opinion, while also listening to others with whom he may not agree.

In short, I have no reservations in providing Sam my highest recommendation. I would be happy to answer any further questions you may have about him. Please feel free to contact me by phone, 510-326-8678, or e-mail, kweisburd@law.gwu.edu with any question.

Sincerely,

Kate Weisburd

Associate Professor of Law
The George Washington University

NYC DOI - OFFICE MEMORANDUM

TO: **Assistant General Counsel,** [redacted]

FROM: **Legal Intern, Sam Lachow**

DATE: **August 14, 2020**

RE: **Defamation Memorandum**

Questions Presented

1. What are the elements of defamation?
2. What are the best defenses that the New York City Department of Investigation (DOI) or DOI employees can use in defamation suits?
3. What types of "best practice" techniques can DOI employees use to avoid defamation lawsuits?

Discussion

I. The Elements of Defamation

New York courts have typically defined defamation as "[m]aking a false statement that tends to expose a person to public contempt, hatred, ridicule aversion or disgrace…" *Tannerite Sports, LLC v. NBCUniversal News Grp.*, 864 F.3d 236, 244 (2d Cir. 2017); *Thomas H. v. Paul B.*, 942 N.Y.S.2d 437, 440 (N.Y. 2012); *citing Geraci v. Probst*, 912 N.Y.S.2d 484, 489 (N.Y. 2010). In contemporary case law defamation claims require, "(1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm." *Tannerite Sports, LLC* 864 F.3d at 245; *Stepanov v. Dow Jones & Co., Inc.*, 987 N.Y.S.2d 37, 41-42 (N.Y. App. Div. 1st Dep't 2014).

Per the first requirement of defamation, a "false" statement, New York uses the "substantial truth" standard to determine if a potentially defamatory claim is true or false. *Tannerite Sports, LLC* 864 F.3d at 242; *see Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991). In order to suffice the "falsity element" of a defamation suit the plaintiff needs to allege that the claimed statement was "substantially false." *Tannerite Sports, LLC* 864 F.3d at 242; *see Franklin v. Daily Holdings, Inc.*, 21 N.Y.S.3d 6, 12 (N.Y. App. Div. 1st Dep't 2015). In other words, "[i]f an allegedly defamatory statement is 'substantially true,' a claim of libel is legally insufficient and . . . should [be] dismissed." *Tannerite*

NYC DOI - OFFICE MEMORANDUM

Sports, LLC 864 F.3d at 242; *quoting Biro v. Conde Nast*, 883 F. Supp.2d 441, 458 (S.D.N.Y. 2012). In determining whether a statement is substantially true courts in New York gauge, "if the statement would not have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Biro*, 883 F. Supp. 2d at 458. Courts have consistently maintained that they do not want to be overly exacting in assessing the truth. Consequently, New York cases consistently cite from the *Cafferty* case in which Justice Crane wrote, "[w]hen the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done." *Tannerite Sports, LLC* 864 F.3d at 242; *quoting Cafferty v. S. Tier Pub. Co.*, 226 N.Y. 87, 93 (N.Y. 1919).

Stephens v. Brunsden is a case that clearly illustrates that defamation claims cannot stand based on mere factual technicalities. Stephens was arrested for his lack of oversight over children in juvenile homes. When Stephens was arrested the DOI issued a press release. Stephens's complaint alleges that five specific statements in the press release were false because they misstated the functions of the "log books" versus the "bed-check sheets." However, "[e]ven if the statements had described the log books accurately, they would not have had a different effect on the reader… because the part tending to expose Stephens to public contempt is the description of his arrest for falsifying records, not the nuances of the records he allegedly falsified." *Stephens v. Brunsden*, 2018 U.S. Dist. LEXIS 143945 at 22. Thus, even though the press release was not accurate, it was not defamatory because the court determined it would not have changed the reader's opinion of what had occurred.

Given falsity is an element of a defamation claim, and only facts can be proven to be false, only statements alleging facts can be cause for a defamation suit. *Davis v. Boeheim*, 998 N.Y.S.2d 131, 136 (N.Y. 2014); *see 600 W. 115th St. Corp. v. Von Guttfeld*, 589 N.Y.S.2d 825, 829 (N.Y. 1992). Typically, a statement of fact can be deemed defamatory as opposed to a "pure opinion" which cannot. *Davis*, 998 N.Y.S.2d at 136. A pure opinion can either be "a statement of opinion which is accompanied by a recitation of the facts upon which it is based," or it can be an opinion not joined with facts as long as it "does not imply that it is based upon undisclosed facts." *Davis v. Boeheim*, 998 N.Y.S.2d 131, 136 (N.Y.